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THE

ADMINISTRATION OF JUSTICE

UNDER

MILITARY AND MARTIAL LAW.

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BY CHARLES M. CLODE,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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"Justice ought to bear rule everywhere, and especially in armies: it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience."—*The Art of War*, by LOUIS DE GAYA, in 1678.

LONDON:

JOHN MURRAY, ALBEMARLE STREET.

1872.

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By the same Author, 2 *vols.*, 8*vo.*, 21*s. each.*

THE HISTORY OF THE ADMINISTRATION AND GOVERNMENT OF THE BRITISH ARMY, from the Revolution of 1688.

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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.

PREFACE.

In presenting this Work to the notice of the Public, I desire to explain, in a few sentences, the circumstances under which it appears, and the purpose which it is intended to serve: hoping in this explanation to satisfy the Reader that this is not a time inopportune for the publication of a Book on "Military and Martial Law."

When the Royal Commissioners on Courts-martial presented their Report to the Crown, they remarked upon the necessity for further information upon the Administration of Military Law. Since the date of that Report, no Work of any kind has appeared; though many Legal and Constitutional changes have followed upon the Army Regulation Act of 1871, and the War Department has prescribed to the Officers in the Regular and Auxiliary Forces the study of Military Law, as an essential qualification for promotion. The necessity, which was apparent in 1868-9, has therefore become urgent in 1872.

It is with the desire of facilitating the acquisition of such knowledge that this Work has been undertaken; and, with this object, I have thought it expedient to collect together in one Volume, all the information—so far as it relates to Court-martial practice—that a Subordinate Officer would desire for the study, or a Superior Officer for the Administration, of Justice in the Army.

The method I have pursued, is to present to the Reader all the materials relating to the Military Code prior to the Mutiny Act of 1689, which, though coming within my official cognizance, have hitherto escaped observation; being persuaded—apart from the historic value which may attach to this informa-

tion—that to an officer Administering the Law of 1872, it is no ordinary satisfaction for him to know that it rests upon a foundation which the experience of two hundred years and upwards has sanctioned.

The Military Code which was adopted by each of the contending parties of the Great Rebellion for the government of their armies was nearly identical in words; and became, in the next reign, the substance of Prince Rupert's Code of 1672.

This, in its turn, became the common parent of the two Codes now regulating the Regular and Marine Forces of Her Majesty; while the Armies of the United States—first in 1775, and again in 1806—have been, and now are, governed by a Code remodeled on the basis of our Mutiny Act and Articles of War then extant.

The early Law of the English Army is, therefore, not a matter solely of National interest; but the able writers on the Military Law of the United States will (if I mistake not) take an interest equal to our own in this subject.

Passing from the consideration of the Law before, I have followed up the subject of the Law after, the Mutiny Act, dwelling upon that, not as a judicial, but as a political measure —as one showing how, with the Crown and the two Houses of Parliament united in Council, the Army can be made subservient to the National will, and kept within the bounds of political expediency.

Prefaced by this information, the practical administration of the Law becomes intelligible; and in the history of the Code and of each Amendment we find the reasons for many of those provisions which are of great practical utility. The dry bones, so to speak, of the Mutiny Act and Articles of War; otherwise so distasteful to the Student, become habilitated with the fragments of Military and Constitutional history, and an interest is created in the various Sections and Articles of the Code which could not otherwise be felt.

In this manner I have endeavoured to give—as I acquired myself—an interest in the Military Code. For many years its early records have been my daily though silent companions; and, for the pleasure which their study has given me, I should be ungrateful indeed if I did not invite attention to their existence, and cite their authority as opportunity offers. Out of their treasure-house has come a system, which in the Army —like that of chivalry in Europe—has "kept alive, even in Servitude itself, the spirit of an exalted Freedom;" and I shall think myself fortunate, if anything here recorded should either aid those in Military authority to execute Justice and to maintain truth in the Army which they have been appointed to command, or induce others not in authority but who advocate change, to consider whether it would not be a wise policy to let well alone, rather than improve away a system which, after two hundred years' experience, is found to "have the confidence of the Army," and to be well spoken of by those who have suffered under its punishments.

London, 5th July, 1872.

ARTICLES OF WAR REFERRED TO IN THIS WORK.

Date.	By what authority proclaimed.	Place of custody.	Printed or referred to in
1629.	Charles I.	Record Office., MS.	Vol. I. p. 18.
1639.	Lord Arundel.	Royal Artillery Library, Woolwich.	Vol. I. p. 429.
1640.	Duke of Northumberland.	Same.	Vol. II. p. 107.
1642.	Lord Essex.	Same.	Vol. I. p. 442.
1662–3.	Lord Albemarle.	[1]	Vol. I. p. 53.
1666.	Same.	[1]	Vol. I. p. 446.
1672.	Prince Rupert.	W. O., purchased from a (Bristol) Pensioner in 1858–9.	
1685.	James II. during Rebellion.	British Museum.	
1686.	James II. after Rebellion.		Grose, Vol. ii. p. 139.
1717.[2]	George I.	British Museum.	Com. Journ., Vol. xviii. p. 910.
1718.	Same.	British Museum.	
1720.	Same.		W. O. MS. Bk. 523, p. 116.
1722.	Same.	British Museum.	
1742. 1748.[3]	George II.	MS. in W. O.	
1749.		A Vol. with Mutiny Act and Arts., W. O. (Solicitor.)	
1750 to 1799.[3]		MS. in W. O.	
1800 to 1872.		MS. and printed copies in W. O.	

[1] Copies (MSS.) were found in the Solicitor's Department of the W. O. by Mr. Hawkins, in 1868; but I have never traced the originals.

[2] The Arts. of War published in the reigns of William III. and Anne are traceable on the Court-martial proceedings of those reigns (see Vol. I. pp. 502, 503). Bruce, when writing, in 1717, his work on 'Military Law,' had the Arts. of Anne before him. (See p. 308, quoted Art. 52.) Those of William III., during the Dutch war, I remember to have seen in the W. O. Books.

[3] These signed by the Sovereign, and formerly kept in the basement of this building, were brought to my notice in 1862. The Arts. of each year were written on folio paper with a marble cover, and a white label pasted on to indicate the year. This label (as the only indication of date) has been preserved, but the Arts. have since been bound in 4 vols., and placed in the Solicitor's Room, W. O.

On the 10th Feb., 1748,[1] the Commons moved an Address to His Majesty that there be laid before the House copies of all Arts. of War made in the reigns of Charles II., James II., William and Mary, and William, Anne, George I., and his then present Majesty (George II.). In reply to which Address the Secretary at War laid before the House :—

For these years. A.D.	Copies of
1721 to 1737. 1739 to 1740. 1742 to 1744.	Rules and Arts. for the better Government of His Majesty's Horse and Foot Guards in Great Britain and Ireland and Dominions beyond the Sea.
1742 to 1745, 1747.	Rules, &c., of the Forces employed in Foreign Parts.
1748 and 1749.	Rules and Arts. for the better Government of His Majesty's Horse and Foot Guards, and all other His Forces in Great Britain and Ireland and Dominions beyond the Seas and Foreign Parts.[2]

Works on Military Law and Discipline cited.

Art of War,' by Lord Orrery, 1677, London.
'Art of War,' by De Gaya, 1678, London.
Bruce's 'Military Law,' 1717, Edinburgh.
'A Short Course of Standing Rules,' 1744, London.
Kane's 'System of Camp Discipline,' 1757, London.
Bland's 'Military Discipline,' by Fawcitt, 1762, London.
(Bland's work was published in 1722.)
Adye, 'Courts-martial,' 1796, London.
(The first edition was written when the author was Judge Advocate General in America prior to 1780.)
Sullivan's 'Martial Law,' 1784, London.
Grose's 'Military Antiquities,' 1786, London.
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(The first edition was published in 1799.)
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Benét's 'Military Law,' 1866, New York, U. S.
Sir Charles Napier's 'Remarks on Military Law,' 1837, London.
John Mawson's 'Records of the Indian Command of General Sir Charles Napier, G.C.B.,' Calcutta, 1851.

Other works referred to, but not cited :—

'Military Law,' 1810, London. Samuel's 'Military Law,' 1816, London. James's 'Court-martial,' 1820, London. 'Kennedy,' 1824, Bombay. 'Law Magazine,' vol. 14, pp. 1-30, London. Hough's 'Military Law,' 1855, London. Griffith's 'Notes,' 1841, Woolwich. D'Agular's 'Courts-martial,' 1843, Dublin. 'The Military Laws of the United States,' by Callan, 1858, Baltimore.

[1] 25 Com. Journ., pp. 736, 738, 740, 742.

[2] Except for 1720, 1742, and 1748, I am unable to trace either copies or originals now existing in the War Office.

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THE

ADMINISTRATION OF JUSTICE

UNDER

MILITARY AND MARTIAL LAW.

CHAPTER I.

INTRODUCTION.

1. In a former work I have endeavoured to write a Constitutional History of "The Military Forces of the Crown," and to describe the method of their "Administration and Government." All that I could there do was to give such a general outline of the Mutiny Act and Articles of War,[1] as the non-professional reader—for whom that work was mainly designed—might be supposed to require. Now, however, that a Work on "Military Law" is said to be needed by the Military profession, I have ventured, in the present volume, to place at their disposal such information as some years of official investigation have enabled me to acquire upon that subject, intending in these pages to give a brief outline of the "History of the Military Code both before and under the Mutiny Act," and at the same time to provide a legal Manual of "The Administration of Justice under Military and Martial Law," for those who—in the discharge of the practical duties of professional life—may have either to study or to administer the Law which governs the Army.[2]

[1] Vol. I. Chap. VIII. The reader will be pleased to note that when a Vol. alone is cited (as in this instance), the work is 'The Military Forces of the Crown' (John Murray, 1869).

[2] In this respect I have had the advantage of many useful suggestions from my friend Colonel Erskine, late Inspector-General of Volunteers, who perused the pages as they passed through the press.

2. The method in which the subject has to be dealt with is the result of the peculiar conditions under which the Law for the Government of the Army has been established and administered, differing essentially as these do from those under which "The Civil Administration of Justice" has been perfected. The growth and development of our Civil Institutions, as brought about by the free thought and action of the whole community, are familiar at least in outline to every reader, but of our "Military Institutions" nothing[1] has been recorded, because little was ever known of them until the present century. Raised as the Army originally was under an influence supposed to be antagonistic to freedom,[2] the people have willingly remained ignorant of the peculiar laws and institutions under which both officers and soldiers were governed.

3. The information which forms the basis of Constitutional, can therefore scarcely be said to exist in relation to Military Law. The rights, whether public or private, of every *citizen* are secured by permanent Statutes—as the Great Charter or the Statute of Frauds—extant alike now as when originally enacted. Having remained for centuries upon the Statute Book, not only has their meaning been rendered explicit by the aid of great Jurists and commentators, but their language become interwoven with our National History. With almost equal truth the same remark may be applied to our Judge-made Law at Westminster. All legal controversies there being settled in open court after a public discussion, in the presence of a learned audience, the reported decisions of our great Judges —as Coke or Hale, Holt or Mansfield—declared the law not only between the litigants, but for the security of society in succeeding years.

4. Essentially different are the conditions under which information on Military Law is to be obtained. In one aspect of the case, no permanent Statute Law now exists. For though prior to the Restoration such law[3] was to some extent to be found on the Statute Book, yet after that event down to the

[1] Bruce's Work, published in 1717, relates rather to the Military Laws of Greece and Rome than of England.

[2] The Army under the Stuarts, See Vol. I. Chaps. III. and IV.

[3] As to the early Law, see Vol. I. pp. 345-355.

date of the Revolution, no Statute relating to the Administration of Justice in the Army is—and after the Revolution none permanent are—to be there found. In the other aspect, the Jurisdiction exercised by Military tribunals has been advisedly withdrawn from public observation. The Judges have dealt with every case without the aid of legal precedent or of forensic argument, and when their decisions have been given, these have been instantly buried in the oblivion of the War Office. A writer on Military Law under ordinary circumstances, therefore, can glean but few materials from sources similar to those which furnish to an author writing on Constitutional Law both information and authority.

5. Now if the Military Code really stood upon slender authority, and was in fact presented to the Army as the emanation of one year, it probably would be received with contumely and treated with disdain. Arbitrary in its provisions and severe in its punishments, such a code, far beyond any other, needs both the sanction of experience and the weight of high authority to command loyal acceptance. In presenting, therefore, the Code of 1872 to the notice of the reader, my object will be to show that, in the Administration of Justice, all the essential conditions which are found in it can be traced in earlier Codes, that Military Law, in many instances to be given, has been in the course of gradual development and improvement. So far from being either framed without experience or unsanctioned by authority, the Code is one which, in its main characteristics, has governed the Army for centuries, has been administered by experienced Generals, repeatedly sanctioned by the deliberate judgment of Parliament, and often upheld after argument by the Constitutional tribunals of the country.

6. From the year 1629 to 1689, there will be no difficulty in shewing, from the Articles of War issued from time to time by Royal authority, and the Court-martial Records which are still extant, what were the provisions of the Military Code, and the modes of procedure prior to the Mutiny Act. In our inquiry these Codes and Records may fairly be accepted as standing in lieu of Statutes and legal decisions in Constitutional History; and although some of these documents will be used and cited in these pages, with but little authentication

save that which may be derived from the place in which and the person by whom this Work is written, yet they will, I hope, be accepted as authentic. Articles of War prior to the present century do not appear to have been regularly printed or published;[1] and those anterior to the reign of George I. have little authentication, except that of being found (as copies) in the War Office. There is, however, no reason that I know of to impeach their authenticity, and absolute credence may, I believe, be given to them.[2]

7. To understand the Military Code at different periods, it may be convenient that some brief description should be given of the Military Governments from time to time existing in the Kingdom, and that, as matter preliminary, some reference should be made to the conditions which a citizen accepts, and the rules which he undertakes to observe, when he enters into the Military Service of the Crown. In neither case is it intended to go beyond the reign of Charles II.—nor that Statute in his[3] reign which "declared the sole supreme government, command and disposition of the Militia, and of all forces by sea and land, and of all forts and places of strength to be the undoubted right of the Kings and Queens of England." The plan on which this Work has been constructed will also be unfolded in this Chapter.

I. As to Military Governments from 1660 to 1872.

8. At the Restoration the Army then existing had been raised by the Commonwealth and commissioned by the Speaker[4] —hence the necessity for asserting, by the Statute recently quoted, the supremacy of the Crown over these forces. To disband all the Regiments would have been practically impossible: besides, a "Guard to the Sovereign" was lawful,[5]

[1] They are not to be found in the War Office. I have an octavo edition for 1749, and that is all.

[2] Since this was written, General Adye, C.B. (the distinguished grandson of the author of 'Military Law') has called my attention to original prints of the Articles of War, 1639 and 1640, in the library of the Royal Artillery at Woolwich. These formerly belonged to Grose, and at his death were purchased by Captain Adye.

[3] Vol. I. p. 34. [4] Vol. II. p. 65. [5] See Note on this, Vol. I. p. 365.

and the maintenance of the "Garrisons" essential for the public safety. The King was therefore authorised by the 12 Car. II., c. 15, to continue the Army on foot to this extent—1st, by re-establishing the "Garrisons" in the same condition in which they stood in 1637, and then (out of the residue of Soldiers) by forming a "Guard" for the person of the sovereign. It was under the title of "Guards and Garrisons" that the Home Army was annually voted by Parliament till the commencement of the present century.[1]

9. These Garrisons appear to have been twenty-five in number.[2] The Officers and men were commissioned—or appointed for life—to each Garrison specifically,[3] and varied in numbers according to the importance of the place to which they were commissioned. Every Garrison—whether a fort or a fortified town—had a Governor, or Commandant, nominated by the Crown under letters patent, and holding either the fortress or his official residence in it, with all the arms and armament, under indent or indenture[4] from the Board of Ordnance. The staff under him would consist (1) of a Town Major and Adjutant in a large town or only of a Fort Adjutant in a fortress; (2) a Chaplain; and, lastly, a Medical Officer. The effective strength of the Garrison consisted—in addition to Garrison or Invalid Battalions—of Master[5] and other gunners as Warrant Officers appointed by the Ordnance Board, and of one or more Regiments of the Line, or Militia,[6] which in times of national danger might be commanded to serve therein by the Crown.

10. Of all the Officers and men within the Garrison the Governor held the supreme command,[7] and none could either

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[1] Vol. I. p. 53.

[2] These were: (1.) Berwick; (2.) Calshot; (3.) Carlisle; (4.) Chester; (5.) Clifford's Fort; (6.) Cinque Ports; (7.) Gravesend and Tilbury; (8.) Hull and Blackhouse; (9.) Hurst Castle; (10.) Holy Island; (11.) Landguard; (12.) St. Maws; (13.) Pendennis; (14.) Plymouth; (15.) Portland Castle; (16.) Portsmouth; (17.) Southsea Castle; (18.) Sheerness; (19.) Scilly Islands; (20.) Scarborough Castle; (21.) Tinmouth; (22.) Tower of London; (23.) Upnor; (24.) Windsor; (25.) North Yarmouth; (26.) Isle of Wight (see Return 1716, Vol. ii., of Com. Rep., p. 105).

[3] Vol. I. pp. 8, 54.

[4] See one relating to Berwick in 1539, Vol. I. p. 413.

[5] The Ordnance Stores were entrusted to this Officer, Vol. II. p. 676.

[6] Vol. I. p. 9.

[7] See the Tower Orders of 26 June, 1728, which are still in force.

enter or depart without his leave.[1] "When a Regiment comes near the Garrison," wrote General Bland in 1727, "the Commanding Officer should send an Officer to acquaint the Governor . . . and desire permission for the Regiment to enter into the town, for without this precaution they will be kept without the barrier till the Officer of the Guard sends and receives the Governor's orders for their admission:"[2] a precaution essential in war (and a rule which was invariably insisted upon by the Duke of Wellington during the Peninsular[3] War), that the Governor of the fortress or Military district may know whether the troops approaching and seeking entrance are to be received as friends or enemies. It became the duty of the Town or Fort Major or Adjutant, as the Officer appointed to aid the Governor in the enforcement of Military discipline after the Regiment had been admitted, to "read the general orders of the Garrison to the Officers and Soldiers, that they might not offend through ignorance"—which duty he was to discharge "in a loud voice in the centre of the Regiment in square, then giving an extract or copy of the orders to the Major that each other Officer might have a copy."[4] The solemnity with which the gates of the Fortress or Garrison were closed at night may be seen from an extract given at the foot from the present Garrison Orders of the Tower of London.[5]

11. As to the Guards, their history has been given by another writer,[6] and a note on "the Guard to the Sovereign" will be found elsewhere.[7] It will be sufficient here to observe, that the

[1] Bland's 'Military Discipline' (1762), p. 229. [2] Ed. 1762, p. 178.
[3] General Order of 20 Aug., 1810. [4] Pages 180, 181.

[5] *Extract from Standing Orders of the Tower of London, November*, 1853.

"II. Main Guard. (3.) When the Gates are closed, the following ceremony takes place: Five minutes before the hour of closing the Gates, the Yeoman Porter applies to the Sergeant of the Main Guard for the Escort of the Queen's Keys. The Sergeant acquaints the Officer that the Escort is called for, who furnishes without delay a Sergeant and six Men for this duty, at the same time placing his Guard under Arms. When the Keys return, the Sentry challenges, "Who comes there?" The Yeoman Porter answers, "The Keys." The Sentry calls, "Whose Keys?" And the answer being given, "Queen Victoria's Keys." the Officer of the Guard gives the command to "Present Arms." The Yeoman Porter then says, in an audible voice, "God preserve Queen Victoria!" and the whole Guard answers, "Amen." The Officer turns in his Guard, and the Keys are carried to the Governor by the Yeoman Porter.

[6] Col. Mackinnon. [7] Vol. I. p. 363.

Regiments sanctioned by the Restoration Parliament were formed, and have since been continued on the Army Establishment. The discipline of each devolved solely on the Colonel with an adjutant—as an executive officer to assist him; subordinate authority was exercised by each Captain over his Company, and the supreme authority over the several Colonels was the Sovereign, who, until the year 1830,[1] exercised a personal command and supervision over these Regiments. While, however, they were quartered in the Tower of London the Constable exercised the supreme command over them in all—other than Regimental—matters.

12. The Guards and Garrisons thus sanctioned by Parliament were paid for by the Crown, and governed under the Royal Prerogative. The supreme command was exercised by the Sovereign personally, even so recently as the reign of George III.[2] The Disciplinary Officers upon the King's Staff were the "Adjutant General"[3] and the "Advocate General,"[4] and the administrative Officer was the Secretary at War.[5] For the better ordering and government of these Troops, Articles of War or Military Orders were put forth by Charles II. in March, 1662-3, framed, as it would appear from their text, by the advice of General Monck, then Duke of Albemarle. Of the contents of these Articles full mention will be made hereafter.

13. The Army was twice augmented during the reign of Charles II., against the wishes of the people as represented in Parliament.[6] The Regiments raised had of necessity to be either billeted on the people or encamped in the open; but in either position more stringent regulations or Articles of War were deemed needful for their government. Hence, upon these augmentations, Articles of War were put forth by the Duke of Albemarle in 1666, and by Prince Rupert in 1672, for the government of Regiments serving more under the command of Generals on the Staff than of Governors of Garrisons.

14. These augmentations (while they lasted) necessarily altered the Military organization or government previously adverted to. In Camps or districts (other than Garrisons) the

[1] Vol. I., p. 365. [2] Vol. II. p. 256. [3] Vol. II. pp. 256-340.
[4] Vol. I. p. 77; Vol. II. p. 359. [5] Vol. I. p. 71, and Vol. II. p. 222.
[6] Vol. I. Chaps. III. and IV.

General-in-Chief held the supreme command; and upon his staff, for all disciplinary matters, he had an Adjutant General,[1] a Judge Advocate,[2] and a Provost Marshal. The discipline of each Regiment, as when in Garrison, was controlled by the Colonel—who in aid thereof had on his Staff an Adjutant and Provost. Detached or independent companies, not regimented, also existed, each under a Captain. The Articles of 1666 and 1672, which had reference to this altered organization, remained in force so long only, during Charles II.'s reign, as the Army continued on foot.

15. The reign of James II. commenced with the Rebellion of Monmouth,[3] and the army had to be employed against the Rebels. Articles of War were therefore put forth for the government of the King's Forces during that Rebellion. Into these were introduced powers for the destruction of property belonging to rebels on the order of the General in Command, which continue in the Code of 1872.[4] The Articles generally were applied to the Civil population during the Rebellion; but the Secretary of War directed Colonel Kirke no longer to use them against Civilians after the Rebellion had ceased.[5] The proceedings of Courts-martial against Soldiers are still extant—trying and condemning them for quasi-political offences.[6] Afterwards, in the year 1686, James II. issued other Articles of War for the government of the Land Forces, which, with his directions with regard to "Military Discipline," furnish a complete record of Military Law as it existed at the time when the Mutiny Act of 1689 was passed.

16. The Army of the Stuarts was (as it has been already noticed) wholly that of the Sovereign. Not only were the officers and men commissioned and raised under Royal authority, but their rights and authority were ignored by Parliament. Claiming exemption from legal process,[7] and living often at free quarters, though nominally maintained by the Crown out of the King's personal revenues,[8] Parliament and the country were heartily glad whenever the King was pleased to dismiss or disband[9] them. Against the Sovereign they had no

[1] Vol. II. pp. 256, 264, 340. [2] Vol. I. p. 77, and Vol. II. p. 359.
[3] Vol. I. p. 79. [4] Art. of War 103. [5] Letter of July, 1685, Vol. I. p. 478.
[6] Ib., p. 475. [7] Vol. I. p. 207. [8] Ib., p. 17. [9] Vol. I. Chaps. III. and IV.

legal redress even for their pay[1] when in—nor for their summary dismissal from—his service.[2] In this respect what the Law was then has remained the Law since; though, as will be presently seen, the Army cannot now be raised without the sanction of Parliament, nor paid without a special vote made to the Sovereign for its maintenance and support.

17. Our Constitutional History here suggests a division of the subject, which I have thought it expedient to adopt. The Military Code, prior to the Mutiny Act, should for convenience be separated from the consideration of the same subject after that Act had given increased authority to the Crown for the Government of the Army and the Military Administration of Justice. It will be seen, by a comparison of the Military Codes before and after the Act, that the Judicial principles, and in some instances the practice also, of both are substantially the same. Any reader, therefore, wishing thoroughly to understand the Military Law after Parliament had passed the Mutiny Act, must study the anterior Codes and that system under which Justice was administered when both (the Code and System then existing) were stamped with the approval of Parliament.

18. Prior to the first Mutiny Act, the conditions imposed by Parliament upon William III., so far as the Army was concerned, were these[3]:—"That within the Kingdom in time of peace the King should neither raise nor keep an Army without the consent of Parliament; (2) That no person born out of the three kingdoms, or our National dominions, except such as are of English parents, should command as an Officer therein."[4] Subsequently the revenues of the Crown were divided into "Public" and "Personal," with specific votes to the Crown for the payment of the Army out of the "Public" revenue.[5] In all other respects the Powers of the Crown remained the same; but the Army became National rather than Royal, because its Establishment was sanctioned, its pay provided,[6] and lastly (as we shall see) its discipline enforced, by Parliament.[7]

19. But the Army of William III. was governed under a

[1] Vol. I. p. 98. [2] Vol. II. pp. 118-123. [3] Vol. I. p. 86. [4] Ib., p. 90.
[5] Vol. I. pp. 25, 66, 110. [6] Vol. I. p. 93. [7] Ib., p. 142.

severer Code than that made by his predecessors under the Prerogative authority of the Crown. The Mutiny Act, without displacing the Articles of War and those Military Tribunals under which the Army had hitherto been governed, gave statutory sanction to the infliction of Capital Punishments for offences rather Political than Military, and which had rarely been so punished under Prerogative authority. The officers, exercising Judicial functions under Statutory powers, used both so unsparingly,[1] that when William III. was securely seated on the throne it became necessary for him by the Articles of War[2] to control by ordering their proceedings to be sent up for Revision, and often to exercise the Prerogative of Mercy in the pardon of Soldiers condemned to death for purely Military offences.

20. The necessity for originally granting the supreme power of life and death to the Officers of the Army resulted from the circumstances attendant upon the Revolution of 1688. The Army of James II.[3] did not so readily accept the Sovereignty of William III. as the Army of the Commonwealth had done that of Charles II.; and the continuance of this power during this and the succeeding reign may probably be accounted for by the fact that the Army during that period was recruited very largely with Foreign[4] Soldiers and with lawless persons from our own gaols.[5] Again, at the accession of the House of Hanover, the Rebellion of 1715 was promoted by persons either then or formerly in the Military Service of the Crown: therefore the same political instrument—to constrain the Army into obedience to the will of Parliament—became needful, and the severer punishments, which during the last year of the Queen's reign had been withdrawn from, were re-enacted in, the Mutiny Act. During the last century the political action of the Army had ceased, but the morâle of the Recruits remained —as the source of supply did—the same. Nor had the character of those who joined the service very considerably improved in 1836, when the Duke of Wellington assured the Commissioners on Military Punishments[6] that British Soldiers were taken entirely from the lowest orders of society.

[1] Vol. II. p. 41. [2] Vol. I. p. 503. [3] Vol. I. p. 142 et seq.
[4] Note S, Vol. II. p. 431. [5] Vol. II. p. 12. [6] Page 324.

21. The First and the changes introduced into the later Mutiny Acts during succeeding reigns till that of George I., present materials for separate consideration, and will form the substance of two separate chapters, one on the "Mutiny Act," and the other on the "Military Code afterwards." Many legal and constitutional questions group themselves around the Act, and its acceptance by Parliament was often the test, whether a standing Army should or should not be maintained. The preamble has also an important bearing upon the question whether the Crown has any, and what, legal authority to proclaim Martial Law. In this and in many other respects the Statute, as a Constitutional safeguard, is one too important to be passed over without a separate consideration. The essential provisions of the Act were not, however, settled by Parliament until 1717-18; nor until then had Statutory authority been given to Articles of War, which from time to time had been issued by the Crown for the government of the Army at home. In that year, for the first time in Parliamentary History, these Articles were laid upon the table of the House of Commons.

22. After the Revolution of 1688, the Army, *i.e.* in all regiments, save the Guards, was dispersed into different parts of the country on Billet under the Personal Government of the King, aided as theretofore by the Adjutant and Advocate Generals on his Staff. These Regiments and independent Companies were mustered first every two, and afterwards every *six* months[1] by Muster Masters, commissioned by the King. That the King might be assured of their efficiency as Soldiers, a General Officer[2] was annually, or oftener, sent down to review and report upon them; but as each Colonel had his own Standing Orders (no General Regulations being in existence) for the discipline and exercise of the Regiment, there was no Standard of uniformity or of efficiency by which progress in the Military art could be tested.[3]

[1] See 1st Art. of War, 1872.

[2] Vol. II. p. 257.

[3] A volume was issued from the War Office on 1st January, 1788, printed by J. Walter, Charing Cross, as "A Collection of Regulations and Orders," under Mr. Burke's Pay Office Act, subsequent to 24 December, 1783," to which prior regulations were added. These were divided under two heads, of "Discipline" and "Accounts," and are, so far as I know, the first authoritative issue of Regulations extant.

23. At the outbreak of the first Revolutionary War in 1792, a General Officer (Lord Amherst) was appointed to the office of Commander-in-Chief by the Sovereign. Great Britain was shortly afterwards divided into Military districts, to each of which a General Officer was appointed to command all the Troops therein other than those quartered within "Garrisons." Each General had an Adjutant upon his Staff, and was subordinate to the Commander-in-Chief at the Horse Guards. Under this organization it became possible to secure uniformity of discipline, and in 1804 General Regulations were put forth by the Adjutant-General with the King's authority, for the guidance of the Army, which each General was ordered to see uniformly obeyed in his District.[1]

24. In course of time the District and the General gradually superseded the Military organization of the Garrison and the Governor, until in the year 1833 the latter organization, with the exception of the Tower Garrison, was abolished. After this change the principle of Military Authority remained the same as theretofore, for the District was as much under the command of the General as the Garrison was under that of the Governor. In the District the General's authority was supreme: no one could enter without his leave, nor continue in it without obeying his Standing Orders for the Government of all Military forces therein. The language of the Military Code underwent a change, and its provisions were adjusted to this new organization; but to render the Law which was in force at each of those periods intelligible to the reader, sufficient has been written of the Military Governments established by Charles II., and of those substituted in 1792.

25. I have thought, therefore, that from the year 1718 the changes in the Military Code may be most readily shown in treating, as it is intended to do, in a practical method, of the "Administration of Justice" under the three main divisions into which the subject may be divided :—(1) The initiation of proceedings by the arrest or confinement of the accused;[2] (2) His arraignment and trial by Court-martial,[3] and, (3) The

[1] As to the state of the Army before and after 1792, see Vol. II. p. 355.

[2] As Chap. V.

[3] As Chap. VI.

confirmation of the finding and sentence of the Court by the Convening Authority, and its consequences.[1] The subject of "Martial Law" will then present itself for consideration in a separate chapter (VIII.), leaving that of "Courts of Inquiry" to furnish materials for the concluding one.

II. The Conditions of Military Service.

26. The manner in which "Officers are commissioned," [2] and "Soldiers [3] are enlisted," has been treated of at considerable length elsewhere. Each of them accepts his retainer at the pleasure of the Crown, and may be displaced from his Military *status* at any moment that the Crown sees fit to discharge him, either with or without previous trial by Court-martial.[4] While in service he is no longer *sui juris* to contract any other obligation, nor can he exercise any rights of Citizenship which may conflict with the obligation of implicit obedience under which he stands pledged to fulfil his Military duty to the Crown.[5]

27. The Law which he has to obey may be divided into two branches, thus:—

I. The "*lex scripta*," which, according to the order in which it must be obeyed, may be stated thus:—

1. (*a*) The Mutiny Act, as the Law expressly sanctioned by Parliament.[6]
2. (*b*) The Articles of War, as the Law made by the Crown under Statutory Authority and in accordance with the Mutiny Act.[7]
3. (*c*) The Regulations or Orders made by the Crown without Statutory Authority, (*a*, *b*, and *c*, relating to the whole Army.)
4. (*d*) The District or Garrison Orders made by the General of the District or Governor of the Garrison, for the several Regiments under his Command.[8]
5. (*e*) The Standing Orders of the Colonel for the Officers and Men of his Regiment.[9]

All orders of subordinates must be consistent with supreme

[1] As Chap. VII. [2] Vol. II. Chap. XVI. [3] Vol. II. Chap. XV.
[4] Vol. II. pp. 118-123, 328. [5] Vol. I. p. 160. [6] Vol. I. pp. 5-11.
[7] Vol. I. pp. 149, 150. [8] See Art. 75 of 1872. [9] Ibid.

authority, and in case of the conflict of Laws,[1] that must be obeyed which is imposed by the higher authority.

"The general purview of the Military Code shows that a Soldier gives himself up wholly to his superior Officer in religion, politics, civil relations, loyalty, internal and external behaviour."[2] He wears his clothes, cuts his hair, holds his person, and regulates his step and action at the command of Officers appointed by the Sovereign.[3]

28. It is perhaps needless to observe that the object of these Standing Orders is to train and maintain the Army in discipline —meaning by that word (to use those of the Great Duke[4]) "habits of obedience to orders, subordination, regularity, and interior Regimental economy," besides "drill." Obedience must be implicitly exacted by each responsible officer, "for nothing (even in Civil affairs) can be more dangerous than to allow the obligations to obey a law to depend on the opinion entertained by individuals of its propriety,"[5] and in military affairs it would be intolerable. "It is not sufficient," wrote Lord Orrery,[6] in 1677, "to make good Rules, unless the Prince or General see them punctually obeyed, or severely punished if broken. For besides the evil which attends the omitting of what is good, the contempt of authority is of fatal consequence in all human affairs, and most of all in Military, where, though what is commanded might have been indifferent itself, yet it ceases to be so when it is commanded; and if a Soldier of himself may break one Rule of the General's unpunished, he may believe thereby that he may as well break any, nay, all the rest; for the stamp of authority is alike on all, of which when a private person or many private men make

[1] I am thus explicit, having referred to Question 409 and other evidence by the Judge Advocate General (Mowbray) in 1869, before the Courts-martial Commissioners. [2] Said in argument, Warden *v.* Bailey, 4 Taunt. Rep., p. 80.

[3] Vol. II. pp. 37, 147.

[4] General Order, 24 September, 1809, p. 118; and, in writing of our allies, he complained, "they want the habits and spirit of Soldiers,—the habit of command on one side and of obedience on the other: mutual confidence between officers and men. And, above all, a determination in the superiors to obey the spirit of the orders they receive, let what will be the consequence, and the spirit to tell the true course if they do not." Vol. iii. ib., p. 854.

[5] Fergusson *v.* Earl of Kinnoul, 9 Cl. and Fin., p. 324.

[6] 'Treatise on the Art of War.' London, 1677.

themselves the Judges, they bid defiance to all discipline, without which no Society can subsist, and Military ones the least of any. In one word, it were much better that good Rules were not made, than, if made, that they should not be observed, and the breakers of them escape unpunished."

29. But this observance of Orders and Regulations is not for Peace only, but more especially for War. "Unfortunately the inefficiency of the Officers," wrote the Duke, "has induced many to consider that the period during which an Army is on service is one of relaxation from all rule, instead of being, as it is, that during which (of *all* others) every rule for the regulation and control of the conduct of the Soldier—for the inspection and care of his arms, ammunition, accoutrements, necessaries, and field equipments, and his horse and horse-appointments, for the receipt and issue and care of his provisions, and the regulation of all that belongs to his food and forage for his horse, must be most strictly attended to, if it is intended that an Army—a British Army in particular—shall be brought in a state of efficiency to meet the enemy in the day of trial."[1] For the object of all disciplinary training is to use against the enemy the strength accumulated from 1000 with the precision of one man.

II. 30. The "*Lex non scripta*,"—those lawful orders which, *viva vôce* or otherwise, the Commanding Officer may from time to time issue, bidding a subordinate to do or refrain from doing, as a Soldier, certain acts till then undisclosed to him. Of course in War there is no limit to obedience ("which is the first, second, and third duty of a Soldier at all times,"[2]), save a physical impossibility to obey. "A subordinate Officer must not judge of the danger, propriety, expediency, or consequence of the order he receives: he must obey—nothing can excuse him but a physical impossibility. A forlorn hope is devoted—many gallant men have been devoted. Victories have been obtained by ordering men upon desperate services, with almost a certainty of death or capture."[3] In Peace these orders must be plainly within

[1] Memo. to Officers, 28 November, 1812, Vol. vi. p. 181; and see Vol. iv. p. 236, and General Order of 20 August, 1810.

[2] Johnstone *v.* Sutton, 1 Te. Rep., p. 549.

[3] Ib., p. 546.

the limits of the Officer's authority;[1] but, for the maintenance of discipline, he may interdict the Officer's or Soldier's departure from the Camp or Barracks,[2] or his attendance at particular meetings or places[3] either in or outside the Camp or Barracks.

31. Possibly in matters of quasi social or political importance a controversy may arise, but "it would," said the late Sir Robert Peel, "be utterly impossible to maintain discipline if soldiers were allowed to be political partisans, correspondents to newspapers, or members of political clubs. Then, indeed, a standing Army would be in truth a curse—then they [the House of Commons] might bid farewell to liberty. It was fairly in the power of the Commanding Officers to interdict a Soldier's communication with the newspapers and to prevent his being a member of a political club. He denied the truth of the doctrine that a Soldier continues to enjoy *all* the rights of a citizen. It was clear that he must forfeit that portion of his civil rights which would interfere with the discipline of the Army."[4]

32. The great bane of any Army is "party spirit," not only with reference to the affairs of the State, but to the merits or demerits of any Military System, or of any Commander. In the Commonwealth[5] the evil of a compact body of armed politicians, sustained at the public cost, but not controlled by the strong arm of power, destroyed all Government. In the Army of the Peninsula no General could have more earnestly guarded against this—as the greatest evil to the Military efficiency of the Army—than the Duke of Wellington. "As soon as an accident happens," he wrote in reference to a charge made by the 16th Hussars, in which a mistake had occurred, "any man who can write, and who has a friend that can read, sits down to write his account of what he does not know and his comments on what he does not understand, and these are diligently circulated and exaggerated by the idle and malicious, of whom there are plenty in all armies. The conse-

[1] See the subject discussed, Vol. I. pp. 155-164, Vol. II. pp. 66, 144-154.

[2] See Duke of Wellington's Memo., Vol. viii. Desp., p. 346. If the Officer acted oppressively, no doubt he would be liable to Court-martial. 26 H.D. (O S.), 1150.

[3] Vol. I. pp. 160-161.

[4] Vol. I. p. 161.

[5] Vol. I. p. 2, and Vol. II. pp. 59, 346.

quence is that Officers and whole Regiments lose their reputation; a spirit of party—which is the bane of all armies—is engendered and fomented; a want of confidence ensues, and there is no character however meritorious, and no action however glorious, which can have justice done it. I have hitherto been so fortunate as to keep down this spirit in this Army, and I am determined to persevere."[1] And in another (earlier) despatch,[2] he points out "the error of Officers in high Command making partisans of those placed under them, instead of making all obey the Constituted Authorities of the State."

33. But one obligation of paramount importance is that of submission to the Military Tribunals under which the Officer or Soldier is amenable to punishment for any Military offences. These Courts, when acting within their jurisdiction, are supreme over the Officers and Soldiers in the Army, and no such person can rightfully complain that he is arraigned as such before them. It will be seen, from the earliest and the latest Codes, that for the adjudication of all matters relating to Officers or Soldiers *inter se*, these Tribunals have been specially constituted; and that an appeal for pecuniary damages to a Civil Tribunal for a Military injury would be a direct violation of that obligation to obedience which every one accepts by his Commission or Enlistment.[3]

34. Military Tribunals are part of the Constitutional Law of the Realm, not for the welfare of the Army alone, but for the protection of the Civil Community. Given a Standing Army, and Military Tribunals are a necessity. "The Army being established by the authority of the Legislature, it is an indispensable requisite," said Lord Loughborough,[4] "that there should be order and discipline kept up in it, and that the persons who compose the Army, for all offences in their Military capacity, should be subject to trial by their Officers. That has induced the absolute necessity of a Mutiny Act, accompanying the Army. One object of that Act is to provide for the Army, but there is a much greater cause for the existence of that Act, viz.,

[1] Desp. of July, 1810, Vol. i. p. 180. [2] In Vol. iii. p. 620, and see p. 671.
[3] See the admirable Judgment of Mr. Justice Willes in Dawkins *v.* Rokeby (*infra*), Chap., IV. par. 9, *post.* [4] Grant *v.* Gould, 1 H. B., p. 100.

the preservation of the peace and safety of the kingdom. The object therefore is to create a Court invested with authority to try those who are part of the Army, in all their different descriptions of Officers and Soldiers, limited to breaches of Military duty."

35. The State in its Civil aspect delegates Judicial functions to Military Officers—places them in command over and holds them responsible for the good order[1] and discipline of their subordinates. It would be most unreasonable, therefore, to deprive Officers acting in the Military Administration of Justice of that established rule of Law which grants immunity from civil actions to those who as Judges, Juries, or Witnesses, are acting in the Civil Administration of Justice. And the Common Law Courts have uniformly refused to do so,[2] for the case of Sutton *v.* Johnstone (which goes beyond this) shows that an Inferior Officer cannot rightfully appeal for pecuniary compensation to a Court of Civil Judicature against his Superior Officer for initiating Court-martial proceedings against him without reasonable or probable cause. "The occasion," said the learned Judges,[3] "has often arisen when men put upon their trial before a Court-martial have thought the charge without a probable cause, and have warmly felt the injury of such an act of malice or oppression; yet, till this experiment (in 1786), it never entered into any man's head that such an action as this would be brought. What condition would a Commander be in if, upon exercising his authority, he is liable to be tried by a Common Law Tribunal? If this action be admitted every acquittal before a Court-martial will produce one. The person unjustly accused is not without a remedy—that which is best among Military men: reparation is done him by his acquittal, and he who accused him unjustly is dismissed the Service and blasted for ever."[4]

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[1] Grant *v.* Gould, *ut sup.*

[2] Dawkins *v.* Rokeby, 4 Fos. and Fin., p. 831; Same *v.* Paulett, 9 B. & S., p. 769.

[3] Lords Mansfield and Loughborough.

[4] 1 Ter. Rep., pp. 548-550. In a somewhat earlier and analogous case (1781), where trespass was brought by a person seized in a prize ship, which was restored by the Court of Admiralty, the Court of King's Bench refused to aid the plaintiff to recover damages for this exercise of authority. "The inconvenience of entertaining such causes would be intolerable," said Mr. Justice Ashurst, "and the Admiralty having jurisdiction in the original matter, ought also to have jurisdiction in everything necessarily incident."—Le Caux *v.* Eden, 2 Dougl. Rep., p. 601.

36. The current of legal authority has been consistent with this ruling of Lords Mansfield and Loughborough in this celebrated case. The Common Law Courts have uniformly refused to sit as Courts of Error or Appeal in matters over which they exercise no original jurisdiction.[1] "It is clear," said Mr. Justice Willes, in a very recent case, "that with respect to those matters placed within the Jurisdiction of the Military Forces, so far as Soldiers are concerned, Military men must determine them. Persons who enter the Military state—who take Her Majesty's pay, and who are content to act under her Commission—although they do not cease to be citizens in point of responsibility, yet they do by a compact (which is intelligible and requires only the statement of it to recommend it to the consideration of any one of common sense) become subject to Military rule and Military discipline;" adding, with some emphasis, that an appeal against the authority of those tribunals, by one subject to them, is a course which cannot be pursued in the Civil Courts.

37. In later passages reference will be made to other decided cases, in which the aid of the Common Law Tribunals has been invoked to restrain the proceedings of Courts-martial to the limits of their Jurisdiction; but to pursue the subject here would oblige a repetition hereafter, and therefore, not to anticipate what will be more properly considered at a later stage, the reader is referred to those pages for fuller information than it is the purpose of this introductory chapter to enter upon.

[1] 1866, Dawkins *v.* Rokeby, 4 Fos. and Fin., p. 831.

CHAPTER II.

THE MILITARY CODE PRIOR TO THE MUTINY ACT.

1. THE Law under which the Army has been governed for nearly two centuries and a half has remained substantially the same. The Offences and Punishments of the Military Code, which it is not intended to enter upon, may have varied with the different circumstances of Peace or War; but the present method of administering Justice in the Army, though improved in the progress and development of Military Science, continues, in its essential features, to be that which was originated in the Reign of Charles I. Viewed in its Constitutional aspect, the Mutiny Act, no doubt, marks an epoch in the History of Military Jurisprudence, and therefore the year in which it passed may be conveniently adopted for the purpose of dividing the consideration of the subject into two branches, as (1) the Military Code prior, and (2) the Military Code subsequent to, the Mutiny Act; the first of which will now engage our attention.

2. But at the threshold of this inquiry lies the subject of "Martial Law;" and as "Martial Law" and "Military Law" —for some years deemed terms synonymous—continue to be used indiscriminately by some authors to express the same meaning, a few paragraphs must be written to explain, first, their common origin, and then to show under what circumstances "Martial" became distinguished from "Military" Law, and how the one has been condemned and the other system upheld by Parliament.[1]

3. The illustrations well suited for this purpose are the two Commissions of Charles I.—the one issued (in 1625), before and

[1] See this distinction further insisted upon, Chap. VIII. par. 3.

condemned by, the Petition of Right (1628); the other (in 1638) after that Petition, and declared by the Judges to be illegal.

4. The Commission of 1625 (directed to the Lord Marshal and Serjeant-Major of the Army, with twenty-three other Civil and Military Persons) was in substance as follows:—It stated that the Soldiers lately returned home would be billeted in certain places (as Plymouth,[1] Devon, and Cornwall), and then averred that disorders and outrages might be timely prevented. The King (more desirous of keeping his people from mischief than of punishing them for the same) gave the powers which the Commission contained to the Commissioners, or to any three of them, within the places named—1st, to proceed, according to the Justice of Martial Law, against enlisted Soldiers and other dissolute persons joining themselves with them, and to punish them for robberies, felonies, mutinies, or other outrages or misdemeanours which, by Martial Law, ought to be punished by death; 2nd, by summary course, as used in Armies in time of War, to proceed to trial and condemnation of such offenders, and to put them to death according to the Law Martial for an example of terror to others, and to keep the rest in due awe and obedience; 3rd, to erect the Gallows or Gibbets in such places as the Commissioners thought fit, and to execute the offenders in open view, "as a warning to others to demean themselves as good subjects" ought to do. The concluding and mandatory part of the Commission was addressed to all Mayors, Sheriffs, Justices, and Peace Officers, charging them, on their allegiance, to aid and assist the Commissioners in the due execution of this "our Royal Commandment," as the Commission was designated.

5. This Instrument shows (according to the theory of Royal Power then asserted) what Martial Law was supposed to be—viz., the arbitrary right to punish or destroy, without legal trial, any assumed delinquent. Such an authority, when exercised, was a direct violation of the fundamental Laws of the Land, as those Laws were thus emphasised and upheld by Parliament in their Petition of Right:—

"Whereas by authority of Parliament, in the 25th year of

[1] 18 Rym. F., p. 255.

the reign of King Edward III., it is declared and enacted, That no man shall stand forejudged of life or limb against the form of the Great Charter and the laws and statutes of this Realm; And by the said Great Charter and other laws and statutes of this your Realm, no man ought to be adjudged to death, but by the laws established in this your Realm, either by the customs of the same Realm or by Acts of Parliament; Whereas no offender, of what kind soever, is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your Realm; Nevertheless of late, divers *Commissions,* under your Majesty's great Seal, have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed, within the land, *according to the justice of Martial Law,* against such soldiers and marines, or other dissolute persons joining with them, as should commit any murder, robberies, felony, mutiny, or other outrage or misdemeanor whatsoever; and by such summary course and order as is agreeable to Martial Law, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the Law Martial:

"By pretext whereof some of your Majesty's subjects have been, by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to, have been judged and executed:

"And also sundry grievous offenders, by colour thereof claiming an exemption, have escaped the punishment due to them by the laws and statutes of this your Realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborn to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by Martial Law, and by authority of such commissions as aforesaid; which commissions and all others of like nature are wholly and directly contrary to the said laws and statutes of this your Realm:

"They do therefore humbly pray your most excellent Majesty . . . . that the aforesaid commissions for proceeding by Martial Law may be revoked and annulled; and

that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land."[1]

6. The Commission of 1638 (issued on the occasion of Charles I. raising an Army to quell Rebellion in the North of England) was directed to Lord Arundel (as General of the Army to be raised to resist Tumult, Seditions, or Conspiracies against the King or State), and gave him power to Command and employ the Army for such Executions, Offences, or Services as might be ordered under Royal Sign Manual.

7. Two distinct purposes were, however, embraced in this Commission. The first was to execute against all Rebels "Martial Law," for the purpose of suppressing the Rebellion, "as to save whom you shall think good to be saved, and to slay, destroy, and put to execution of death such and so many as you shall think meet by your discretion to be put to death by any manner of means, to the terror of all other offenders;" and the second was to govern the Army under what may be termed Military Law. Thus, "as well by yourself as by your deputies, to hear all criminal causes growing and arising within the Army, as well concerning the death of any person as loss of members and all causes civil, whatsoever they be," and "to make and ordain Ordinances for the good government, rule and order of the Army," with the power of enforcing them by Capital Punishment.

8. Both purposes, so far as they were to be carried out by punishments affecting the life or limb of the offenders, were alike illegal; for Rushworth[2] has preserved a letter (under date of 13th July, 1640) from Lord Conway, a Lieutenant-General in the Northern Army at Newcastle, in which he thus writes of the illegality of similar powers entrusted to or, at least, executed by the Duke of Northumberland:[3]—

"My Lord of Northumberland did write to me, that having had occasion to look into the power he hath to give com-

[1] Statutes of the Realm, Vol. v. fol. 24. [2] 3 Rush. Col., p. 1199.
[3] See these Arts. of War, printed in Grose, Vol. ii. p. 107 (1788).

missions, the lawyers and judges are all of opinion that Martial Law cannot be executed here in England, but when an enemy is really near to an army of the King's and that it is necessary that both my Lord of Northumberland and myself do take a pardon for the man that was executed here for the mutiny. If this be so, it is all one as to break the troops, for so soon as it shall be known, there will be no obedience; therefore put some remedy to this by all means very speedily. There are now here in prison two men for killing of men, and the Provost Marshal for letting them escape out of prison, although he took them again; I do forbear to call them to a council of war, neither dare I tell the reason why I do not, being often urged, but suffer them to think me negligent. I do not think it fit that the lawyers should deliver any opinion, for, if the soldiers do know that it is questioned, they will decide it by their disobedience, as the country doth by their ship-money, and with far more dangerous consequence, for the soldier may bring the country to reason, but who shall compel the soldier? Therefore, if it cannot be helped with a commission of *oyer* and *terminer*, which must be only in the officer or officers of the army, or in some special commission of the King's, such as he gives when noblemen are arraigned; let him then give under his own hand a commission for the execution of Martial Law, to him that will hazard his life and estate upon the King's word. Sir Jacob Ashley hath no Commission for the execution of Martial Law; but if the fault deserve death, he is to advertise my Lord of Northumberland. This will absolutely undo all. The soldier must be punished by his officer; if it would come to debate, some may peradventure say, that for faults that deserve death, the soldier may be sent to the gaol to be tried by the judges. This will take away the respect of the soldier to the officer, and there will presently be no obedience or care either in soldier or officer. I think that this doth so much more concern the King in the government of the Army, that if a lawyer should say so here, if I had a commission, I would hang him, and so I think the King ought to do others."

9. From this period no such Commission, expressly given by the King to a General Officer for the execution of his subjects under "Martial Law," has been known of in England. For the

suppression of the Rebellion in Ireland a Commission, in terms nearly similar to that of 1638,[1] was given by William III. to Marshal Schomberg, which he carried into execution there. But "Martial Law," as a measure of justice, has had no existence in this Kingdom since the close of Monmouth's Rebellion.

10. Leaving, therefore, the subject of "Martial Law" for the present, but to be resumed hereafter,[2] an endeavour will be made to give an outline of the several Military Codes that were in force during the reigns of the Stuarts, and to explain how Justice was administered in the Army under those Military Tribunals which were first established by the Royal Prerogative, and ultimately received the sanction of Parliament.

11. The difficulties which beset the adoption of a Military Code with Military Tribunals are to be gathered from the Petition of Right and the letter of Lord Conway. The contention of Parliament was that the Soldier should never be withdrawn from the protection, nor from the punishments, of the Common Law Tribunals. The Generals, whether in command of the Royal or of the Parliamentary Armies, were on the other hand equally agreed that "the Soldier must be punished by his Officer," or, in other words, that the discipline of the Army could only be maintained by absolute power being vested in the supreme Military Chiefs and in the Military Tribunals constituted under their authority. A Commission of Oyer and Terminer directed to the Officers in the Field and some country gentlemen for the trial of the members of the Army *in pay* was suggested by the Commons during the Rebellion,[3] but Lord Essex replied, that "if Parliament allowed him no Commission of Martial Law, he could not be answerable for what mischief might happen or disorder that might ensue." At last this concession was made, and Articles of War, known as those of Lord Essex, were put forth in 1642, with the sanction of both Houses of Parliament.

12. The Court of the Marshal—referred to in the several Codes of Charles I.'s reign—appears to have been created in analogy to

[1] C. M. Bk. (114), p. 96. [2] Chap. VIII., *post.* [3] Vol. I. p. 23.

the Court of the Constable and Marshal, which was expressly recognised in the Statute of Richard II. c. 2, "to have cognizance of contracts touching deeds of Arms and War out of the Realm;[1] and also of War within the Realm which cannot be determined nor discussed by the Common Law, with other usages and customs to the same matters pertaining."

The power of the Marshal, and of his deputies, in matters within his Jurisdiction was alleged to be absolute, even in life or death. His judicial proceedings were unfettered by forms, and his powers of punishment both plenary and summary. His sentences were executed in the King's name, and no appeal could be made against his decrees, save to the person of the Sovereign. The office of Constable lapsed on the attainder of the Duke of Buckingham in 1521; and his Jurisdiction, as some doubt appears to have been entertained whether the Marshal alone could exercise it, was permitted to fall into desuetude until sought to be revived in 1639: whereupon the Commons declared the Marshal's Court to be a grievance.[2]

13. In the lesser matters of discipline—as disobedience to positive commands or neglect of Military duties—the power of the Crown, arising from the contract or engagement of the Officer and Soldier, was considerable.

As the responsibility of defending the Realm, so the power of engaging Officers and Soldiers for Military Service devolved on the Crown.[3] The terms upon which these engagements were made varied in some particulars, according to the exigencies of the times; but two conditions—one of inflexible loyalty to the Sovereign, and the other of implicit obedience to the General in Command—never were wanting.

Thus this contract, in its results, gave to the Crown an absolute control over the service and pay of the Army; for no command of the King and General could be disobeyed,[4] save at the peril of punishment by the Crown or trial by Court-martial;

[1] A writer of 1602 describes their Jurisdiction as including trespasses and hurts done by one Soldier to another; that for any Soldier to arrest another, but by the Marshal, was punishable; to punish Sutlers and those who failed in watching and warding.*

[2] Vol. I. p. 23. [3] Vol. I. pp. 1 to 15. [4] Vol. I. p. 144; Vol. II. p. 37.

* Tytler's Essay, p. 379, note.

and no pay of the Army, if withheld,[1] could be recovered by legal proceedings against the Crown. Hence service enforced and pay withheld were then, and have been since, used as means supplementary for enforcing Military discipline.

14. For the last 200 years and upwards the substance of the Officer's or Soldier's engagement with the Crown, has seldom varied. At present the Officer's agreement is:—1. As towards[2] his inferiors, to take charge of the Officers and Soldiers serving under him, to exercise and well discipline them in arms, and to keep them in good order and discipline (those under him being commanded to obey him as their superior Officer.) 2. As towards the Crown and his superiors, to observe and follow such orders and directions as from time to time he shall receive from the Sovereign or any of his superior Officers, according to the rules and discipline of law. The Soldier's agreement[3] (usually confirmed by his oath)[4] is:—1. To defend the Sovereign, his crown and dignity, against all enemies; and, 2. To observe and obey all orders of his Majesty and of the Generals and Officers set over him.

15. The Articles of War were made, as Royal Orders or Commands, to confirm and enforce these Military obligations. The Code, by the imposition of an oath, secured the allegiance of the Army to the person of the Sovereign, and obliged the affirmants to accept all the Royal commands as lawful ones, and as binding upon them to carry out.

16. The Articles of War put forth by Charles I. A.D. 1629,[5] by the advice of the Council of War, were expressed to be "for the government and good ordering of the Troops in England, either in an Army, or in Regiments, or in single Companies." Dealing with moral and religious duties, the Code sought to enforce

[1] Vol. I. p. 98. [2] Vol. II. p. 65. [3] Vol. I. p. 440; Vol. II. p. 36.

[4] Soldiers having been convicted by Court-martial of Feniansm, Mr. Secretary Bruce, wrote on 17th March, 1871, refusing to pardon them as "those who by *perjury* and mutinous Acts have brought disgrace on the profession of Gallant Soldiers."—House of Lords Papers (31) 1 March, 1872. Mr. Gladstone wrote, "We are compelled to view them differently, alike from a regard to general principles and by our duty as Ministers of the Crown to uphold the highest standard of honour and fidelity in the noble service to which they belong."—The 'Times,' 10th June, 1872. [5] Vol. I. p. 18.

these against the Soldiers by various minor punishments, *ex. gra.*, by branding with hot iron for swearing; seven days' imprisonment, with bread and water, for drunkenness; or for drunkenness on guard by strappadoe. Acts of violence or uncivil speech, either against his Majesty or any person in authority, were to be punished by death and without mercy. With regard to Military duties or offences, the Code was framed upon the assumption that the Soldier, and not the Officer, was the usual offender; but both Officers and Soldiers were to be sworn "to be faithful to his Majesty, both in thought, word, and deed; not to conceal anything not for his service which they saw or heard; and to obey all his lawful commandments."

17. The Administration of Justice "to hear, judge, and determine any fact done by Soldiers," was given to the Marshal's Court, having, however, "no power to put to death till they had advertised the General that shall have authority for life and death for such Troops as he shall command." In every Market there was to be a gibbet and strappadoe, and in every Borough "a Provost with a prison ordained for Soldiers apart from any other." The Code concluded with an article which probably contained a description of the Provost-General's duties as then understood. "The Provost must have a horse allowed him, and some Soldiers to attend him, and all the rest commanded to obey him and assist him, or else the Service will suffer; for he is but one man and must correct many, and therefore he cannot be beloved.[1] And he must be riding from one Garrison to another, to see that the Soldiers do no outrage nor scath about the country."

18. The Laws and Ordinances of War put forth in 1639 under the authority of the Royal Commission of 1638 before referred to,[2] were addressed to the Officers and Soldiers of the Northern Army, "which Laws being thus ordained and proclaimed, all the persons were to swear thereto, and thereupon to observe and keep them under the pains and penalties therein expressed." In one particular only, viz., in their political colouring, these Articles varied essentially from those of 1642. Each Code dealt

[1] For illustration in modern times, see Vol. vii. Gur. Desp., p. 169.
[2] Vol. I. p. 429.

with different subjects under distinct headings. For instance, in the Code of 1639. (1) "Religion and Moral Duties," in thirteen Articles. (2) "The Safety of the Army Royal," in twelve Articles. (3) "Captains' and Soldiers' Duties in Particular," in twenty-nine Articles. (4) The Camp or Garrison," in sixteen Articles. (5) Lawful Spoils and Prizes," in five Articles. (6) The Administration of Justice," in fourteen Articles. While the Code of 1642[1] had twelve separate headings, as (1) "Duties to God," in three Articles. (2) Duties in General," in five Articles. (3) "Towards Superiors and Commanders," in ten Articles. (4) "Moral," in seven Articles. (5) "Soldier's Duties touching his Arms, &c.," in seven Articles. (6) "In Marching," in four Articles. (7) "In the Camp and Garrison," in eighteen Articles. (8) "In Action," in eleven Articles. (9) "Of Commanders and Officers in Particular," in twelve Articles. (10) "Of the Muster Master," in six Articles. (11) "Of Victuallers," in four Articles. (12) "Of Administration of Justice," in nine Articles.[2]

19. The King's Army was enlisted to uphold his authority, then contravened by Parliament; therefore, by the Code of 1639, "whoever should presume to say or insinuate that the Army was unlawful or unnecessary should suffer as a rebel," while the Officers and Men were sworn, not only to allegiance, but "constantly to oppose all seditions and treasons against the Royal Dignity." The Code itself was made binding by oath, "The Soldiers, holding up their hand or fingers and saying, 'We hold all these Laws and Ordinances as sacred and good, and will conform, fulfil, and keep them to the uttermost of our power.'" The Code of 1642, however, imposed no oath, neither was the King's name or authority mentioned; but "any one using words tending to the death of the Lord General," was to suffer death. Both Codes constrained the Soldier to implicit obedience to his Commanding Officer; and contained an explicit prohibition against seditious or mutinous meetings. Such a meeting "to

[1] Vol. I. p. 442.

[2] Most of the Articles of this Code "are literally the same" as those issued by the Earl of Northumberland for the government of the Royal Forces, in 1640. So that both armies, though opposed to each other, were governed by the same Military Code.—See Grose's 'M. Ant.', Vol. ii. p. 107, note. Chap. IV. par. 25, *post*.

demand their pay," was, by the Code of 1642, punishable with death.

20. The Administration of Justice was better provided for in the Code of 1639 than in that of 1642. The first Article gave authority "to the Council of War and the Advocate of the Army to enquire of the actors and circumstances of offences committed, by the oaths of such and so many" as they thought convenient, using "all means for examination and trial of persons delated, suspected, or defamed." This Article had reference to the "Justice of Martial Law," and to persons other than Soldiers who were deemed to be offenders against the King; for the second Article declared, in words nearly identical with those used in the Code of 1642, "That all causes and controversies arising betwixt Captains and Soldiers, and all others within the Camp, should be heard summarily, and execution done according to the Military Laws by the Council of War," without appeal, "unless circumstances required stay or deliberation." All proceedings in the Marshal's Court were to be truly recorded (even the Wills and testamentary dispositions being registered therein); but neither Code fixed any limit to the General's authority, nor laid down any rules for the formation of the Marshal's Court, nor for its method of procedure.

21. In the severity of punishment little difference is to be traced in either Code. In that of 1639 by thirty-four, and in that of 1642 by forty-three Articles, death was the punishment prescribed for various offences. The lesser punishments, besides loss of pay or office, fine, and imprisonment, were those of burning the tongue with a hot iron, whipping, bastinado by his Officer, riding the wooden horse, bread and water, servile office in the Army, besides such other punishments, not extending to life or limb, as the Court-martial should award. The gaoler and executioner was the Provost; he was bound to hold every prisoner committed to him till discharged by Warrant, and to see all judgments, sentences, and commands of the Lord General and Council of War put in execution. Both Codes contained an Article providing that if Regiments or Corps failed in their duty (defined in the Code of 1642 as retreating "before they came to handy strokes"), the officers and every tenth Soldier should be punished with severity, and the other of the Soldiers

should be put to servile offices in the Army "until by some brave exploit they purge themselves." The last clause in each Code was in substance and effect that Article which in Lord Hardinge's time the Soldiers called "the Devil's Article," viz., for punishing indefinitely crimes for which no special Order had been set down.[1]

22. During the Reign of Charles II. the Military Code and the Administration of Justice assumed the definite outlines in which both were adopted by Parliament in the Reign of William and Mary. The Parliament of the Restoration gave no sanction to Military Law: on the contrary, it established a Militia force in each County, committing the discipline to the Lieutenant and his deputies, with the aid of the Civil Magistrates, to whom was given the power of fine and imprisonment.[2] Both Houses were teeming with loyalty to the King and abhorrence of the late Rebellion; therefore they imposed on every Militia Officer and Soldier the oath,[3] "That it is not lawful, upon any pretence whatever, to take arms against the King, and that I do abhor that traitorous position that arms may be taken by his authority against his person or against those that are commissioned by him in pursuance of such Military Commissions."

23. But before the establishment of the Militia, the King had been permitted by Parliament, as already mentioned, to retain at his own cost a body of Soldiers[4] designated, for many years afterwards, "His Majesty's Guards and Garrisons," and ultimately forming the "Standing Army" referred to in the Bill of Rights and Act of Settlement. Fearing lest the country should have to pay for these Troops, if Parliament recognized them, the King was left to govern them under his Prerogative; and with that view he issued in March, 1662-3, with Albemarle's advice, Orders (twenty-three in number) for the mustering, regulation, and payment of these Troops, six only of which had reference to strictly Military offences. "Laws and Ordinances of War" were to be thereafter issued "upon more mature deliberation;" meanwhile authority was given to the General to

[1] Vol. I. p. 439; and his Evidence "Military Punishments," 1836, p. 297.
[2] Vol. I. p. 34; 13 and 14 Car. II. c. 3, secs. 8-10.
[3] Sec. 19.
[4] 12 Car. II. c. 15, and Vol. I. p. 53.

constitute Courts-martial, and to the "Judge Advocate of the Forces" to take information and depositions upon oath as occasion should require in all matters triable before Court-martial. "We will (these orders concluded) that in all cases wherein any person is to suffer the pain of death, no trial, execution, or proceeding be made, but according to the known Laws of the Land, if the crimes are punishable thereby, or otherwise by special Commission under the Great Seal by advice of our Judges."

24. The occasion for "Orders and Articles of War" arose, 1st, on the declaration of War by the French King in 1666, and 2ndly, on the anticipation of War in 1672. These Articles, as will be seen, develop the Military Code and system of Military Judicature subsequently established under the Authority of Parliament by the first Mutiny Act (and, indeed, now existing) for the better Government of His Majesty's Land Forces. The substance of these Codes must therefore be noticed.

25. The Code of 1666[1] was framed on the model of the Parliamentary Code of 1642. The contents were arranged under the same twelve headings, with one other (the second with two Articles) added, "of Duties to the King;" imposing in the first Article the penalty of death "upon any Soldier using any traitorous words against the King's person or authority," and in the second, upon the Officers and men, that oath which the Statute Law had imposed on the Officers and Soldiers of the Militia force. These "Orders and Articles of War" were put forth "for the better ordering the Discipline and Government" of the Army, and all Officers and Soldiers were enjoined to keep and observe them as Military Orders and Articles. They were to be read at the head of every Regiment and in each Garrison on muster days; but there could be no pretence for saying, as it was suggested in Parliament, that these Articles were put forth as a commission of "Martial Law" against the Civil population.

26. "For the better administration of Justice," the Code

[1] Vol. I. p. 446, and par. 18, *ante*, and note.

established:—1st, a "General Court-martial" for offences punishable with life or limb; 2ndly, "Regimental" Courts for lesser offences not extending to such punishment; and 3rdly, "Detachment," with the powers of Regimental Courts. The General Court was to be appointed by the General in Command as often as occasion should require, consisting of thirteen Commissioned Officers, five at least to be Captains, and none under that degree when a Field Officer was to be tried. The Judge Advocate was to attend, to summon witnesses and to administer oaths, but there was no direction that the proceedings should be recorded. The Regimental Court was for the trial of Soldiers only, by their Officers; and the Governor of each Garrison was to have the power of forming a Court with similar powers by taking in (as occasion required) "a convenient number of Officers of the next adjacent Governor's." The Marshal, as theretofore, acting as Gaoler, had no discretionary disciplinary powers given him. He had to hold prisoners committed into his custody, but the Committing Officer was bound to deliver with his prisoner "the cause and reason of his imprisonment." Within forty-eight hours after the commitment, the Judge Advocate General was to be apprised thereof, that he might forthwith acquaint the General and obtain an order for a Court-martial or release the prisoner.

27. The Civil authority was so far interfered with, that the Justices were prohibited from imprisoning Officers or Soldiers except for capital crimes. Debts were to be proved by oath before the Judge Advocate General, and to be left for payment for twenty-eight days before Civil remedies for recovery could be adopted. Criminal offences against the Civil population were made punishable before Court-martial; but there was no prohibition, other than that just referred to, against the action of the Civil Magistrate.

28. As the Code of 1672 was said by some speakers in Parliament to have been drawn up on the French model, a short reference to the contents of a work styled 'The Art of War and Way that it is practised in France, by Louis de Gaya,' an expert Officer in the French Army, translated into English and published at London in 1678, will give the reader some

insight into the method of administering Justice then extant in the Army of France.

29. The work—the substance of which was put forth by James II. for the use of the Army as a book of Military discipline—is divided into two parts. The arrangements described in the first are those of an Army in general, and the various Staff Officers commanding it; in the 2nd, those of a Regiment, and of the Officers composing it. In the 1st part—after the passage which I have transcribed on the title page of this work—the author goes on to describe [1] "the duties of the Provost Marshal of the Army and his way of Justice." "He hath a troop of Officers on horseback with a Lieutenant Exempt, a Clerk to record his processes, and an executioner to punish those that offend against the orders of the King and General." In the 2nd part [2] he treats of "the Provost Marshal of a Regiment," as having under him Officers similar to those under the Provost Marshal of the Army. His duty is to pursue and apprehend deserters and delinquents, to bring in indictments, interrogate and confront witnesses; and the process being drawn up, he carries it to the Major, who gives the conclusions for the Colonels and Captains afterwards to judge.

30. The author then proceeds [3] to treat of "Councils of War," dividing them into "General Councils of the Army" held at the General's lodgings or tent, and "Private Councils" held at the Governor's quarters in Garrison, or at the Colonel's tent in Camp. The proceedings of the latter Council he describes thus,—that the Colonel sits as "President" at the top; the Major, as King's Proctor or Solicitor, at the end; and the Captains, according to seniority, at the sides of the table. The Subaltern Officers had a right to stand uncovered at the Captain's backs, but had no vote. After deliberation, and at the request of the President, each Captain gave his opinion, beginning with the youngest till it came to the President, who pronounced last. The Clerk—taking down their votes, and according to the plurality of votes—drew up the Sentence, which was signed by the President and Captains.

31. In Criminal cases, more care was to be taken to secure

[1] Chap. xiv. [2] Chap. xiii. [3] Chap. xx.

the attainment of Justice. The Council should never consist of less than seven Officers; and if Captains could not be obtained, inferior Officers, even to Sergeants, were to be called in. The Officers forming the Court were to come fasting, and after Mass. The Clerk was to read out the informations, and the evidence sent up by the Major. The prisoner being then introduced, and sitting on a footstool, was questioned on the facts, and then sent back to prison. The Clerk having informed the Court of the conclusions of the Major, each Officer was to give his vote according to his conscience, and the ordinances of the King. The finding and sentence were then recorded. On the execution of the prisoner, the Regiment was summoned by the Major to witness it; and the Criminal, first being degraded from the Army by the Major, then was executed under the orders of the Provost Marshal.

32. The discipline of each Company was with the Captain, who appointed, but could not degrade, the Non-commissioned Officers, that being reserved for the Council of War. Soldiers in rebellion he could kill; but no other offence could he punish, except by imprisoning the offender and delivering "him up to the Justice that is set over the Regiment."

33. If we may believe Mr. Secretary Coventry's[1] statement in Parliament, the Articles of 1672, though bearing the King's name and authority, were put forth by Prince Rupert under his Commission, and were only to be executed abroad. They contained no "French Articles," but were in fact a careful collation of the best Articles from those put forth during the Civil War by Lords Essex and Strafford. Framed on the model of Lord Essex's Articles, 1642, they certainly deserve a careful consideration from those interested in the History of Military Law.

34. The Sections under which this Code was divided and the several duties prescribed were these:—(1) To Almighty God, Articles 1 to 6; (2) To his Sacred Majesty and Kingly Government, 7 to 10; (3) Towards Superior Officers and Commanders, 11 to 16; (4) In Marching or in Action, 17 to 21; (5) Where

[1] 4 Parl. Hist., pp. 605, 619.

an enemy is subdued, 22 to 26; (6) In Camp or in Garrison, 27 to 36; (7) Of Musters, 37 to 53; (8) Victuals and Ammunition, 54 to 58; and lastly (9) For the Administration of Justice," 59 to 74.

35. "After the service of God Almighty, all Officers and Soldiers shall serve us faithfully to the best of their skill, power, and understanding;" and therefore an oath of fidelity in these terms was to be taken: To be true to the King and his lawful heirs and successors. To be obedient in all things to his General. To behave obediently towards his Superior Officers —in all they should command for the King's service; and lastly, to be a true, faithful, and obedient servant and Soldier—"every way performing my best endeavours for the King's service, obeying all orders, and submitting to all such rules and Articles of War as are or shall be established by His Majesty." In the same spirit, death was imposed for the use of traitorous words against the King, or for enticing or persuading to join or engage in any traitorous or rebellious act.

36. Under the third Section, if any number of Soldiers should assemble to take counsel for demanding their pay, death was imposed on any Inferior Officers accessory thereto; and that or other punishment was to be awarded against the Soldiers by a General Court-martial. Both Officers and Soldiers "uttering words tending to Sedition, Mutiny, or Uproar," or hearing "any mutinous or seditious words spoken," without immediately revealing the same to his superior, were liable to such punishment as a Court-martial should think fit to award; but disobedience to a Superior Officer was only to be punished by dismissal, or such punishment as a Court-martial should award.

37. Justice was to be administered in the two Courts named in the Code of 1666, viz., that of the "General" for grave offences, and that of the Colonel of the Regiment for the lesser ones of Discipline. There was, however, no definition of the relative powers or authorities of these Courts. The number of Judges was not prescribed, but those of either Court were "to take an oath for the Administration of Justice according to these Articles or (where these Articles assign no absolute punishment) according to their consciences, the best of their understandings, and the custom of War in like cases." Every Judge was to deliver

his vote or opinion distinctly; the sentence was to be by the plurality, or with the President's casting voice in case of the equality of votes. The Sentence, when given, was to be pronounced by the President, and execution to be done "on Warrant" by the Provost Marshal. In Criminal Causes affecting the Crown, the Judge Advocate General had to inform and prosecute on behalf of the Crown; and of all proceedings by General Court-martial, a Clerk was to be sworn to make a true and faithful record.

38. The Regimental Court had primary Jurisdiction over "all controversies either between Soldiers and their Captains and other Officers, or between Soldiers and Soldiers relating to their Military capacities;" but if either of the parties felt himself aggrieved, he had an appeal to the General Court-martial, subject to this penalty,—that if he failed to "make good his suggestion, he should recompense the other for the trouble and charge of such appeal." The internal discipline of the Regiment was in effect with the Captains, in subordination to the Colonel, and the Provost of each Regiment carried into execution the Sentence of its Court.

39. There was far less of arbitrary power in these than in other Articles of War, either of earlier or later date. I gather from them that the office of Provost Marshal (either Regimental or General) was to apprehend and hold offenders for trial; and when found guilty after trial, to punish them according to the sentence of the Court. In the execution of these duties no one was to hinder the Provost, except upon pain of death; but, on the contrary, all Officers and Soldiers were to aid him, or failing (on his request) to do so, they were to suffer such punishment as a Court-martial should award.

40. A redress of wrongs for the Soldier, or inferior against his superior Officer, was also provided. Permission was given to him to complain in the first instance to the Colonel, who (on due proof) was to redress the wrong, or, failing to do so, the party grieved might apply to his General for redress, subject to the wholesome punishment by Court-martial "if the accusation be false." Under no circumstances, however, was the Soldier to "take his own satisfaction."

41. These Articles—only to be brought into operation abroad,

as it was alleged by Secretary Coventry—made no reference to the Civil power, and the jurisdiction of the Magistrate was not ostensibly interfered with. The King, however, in December, 1672, issued a Proclamation [1] (which the Commons presented as a grievance) enjoining his subjects to appeal to the Officer for protection against any injury from the Soldier; and in case of need, through a Secretary of State, to His Majesty, that he (and not the ordinary Common Law Tribunals) might give relief to the person injured and punish the Soldier.[2] The Proclamation was no doubt within the preamble of the Petition of Right, and was intended to operate "as a measure exempting the Soldier from the ordinary course of Justice." It occasioned, therefore, a strong feeling of opposition to be manifested in Parliament, and revived fears (never altogether dormant) against the re-introduction of "Martial Law" by Royal Proclamation.

42. Contrasting the Codes of 1666 and 1672, with regard to infliction of punishment, the latter was far more lenient than the former. In the first there were 42, but in the other only 22 Articles which awarded the punishment of death. Running the gauntlet and imprisonment in irons were added to the lesser punishments in the Code of 1666, which in other respects remained much the same in each, except that power was given by that of 1666 to inflict "arbitrary punishment," or as otherwise expressed, "arbitrary correction," which, so far as regards the expression used, is not to be found in that of 1672.

43. On the Rebellion of Monmouth, James II. put forth Articles of War (sixty-five in number), to remain in force during the Rebellion; but the later Military Code of James II., dated 1686, was in substance that of 1672, with clauses omitted and added,[3] besides such other modifications as may be easily explained. First, to the Oath of Fidelity was added the substance of the Militia Oath against the unlawfulness of taking up arms against the King. Secondly, to the Article (14) against Mutiny

[1] Vol. I. p. 453.

[2] Vol. I. p. 61.

[3] From Code of 1672; viz., 10, 24, 26, 27, 37 to 42, 44, 45, 50 [incorporated with 38], 51,

reducing 74 through omission of 14 to 60
4 added 4
Total of 64

King James's Code.

was added words inflicting capital punishment "on any person who should presume so far as to raise or cause the least Mutiny or Sedition in the Army." To the 4th Section, two Articles (17 and 18) were added, inflicting capital punishment "on Murder or wilful killing of any person," and the like punishment "on robbery or theft committed by any person in or belonging to the Army." To the last Section was added the Devil's Article (64), with this proviso, "that no punishment amounting to the loss of life or limb be inflicted on any offender in time of Peace, although the same be allotted for the said offence by the Articles and the laws and customs of War."

The Code was altered in one other important particular, viz., in being made applicable to "rebels" as well as to enemies; so that (as in Monmouth's Rebellion) it might have been used against the Civil Community as such.[1] The King also put forth Directions with regard to Military Discipline, which are printed at the end this Chapter.

44. Such, then, was the Code which was in force when the throne was declared to be vacant by the abdication of James II. The Army were pledged by their oaths to his service, and when the Scotch Regiments refused to obey the orders of William III. but went on their way northward, declaring that[2] "James" was their king, the interference of Parliament became a political necessity, arising from no ordinary circumstances, but certainly not from a desire to ameliorate or amend the Military Code. Had Parliament not expressly sanctioned the change of dynasty, the punishment of the Soldier for Mutiny or Sedition against William III. would have been impossible. Hence the Mutiny Act of 1689, with its annual renewal, always encountered a strenuous opposition for many years at the hands of the Jacobites.

45. Something of the mode of Judicial procedure is to be gathered from the Record of a General Court-martial after Monmouth's Rebellion, printed elsewhere,[3] and from the Court-

[1] The Code here referred to—which is printed in Grose, 'M. Ant.,' Vol. ii. p. 139—was put forth to govern the Camp at Hounslow. There was another code of earlier date, judging by the references in the Court-martial Trials. See also Rules for regulating Courts-martial, C. M. Bk. (114), p. 49.

[2] Vol. I. pp. 142, 497.

[3] Vol. I. pp. 475-478.

martial Books of that period, in which are usually found entered (1) "the Royal Sign Manual Warrant for holding the Court; (2) the Proceedings thereunder; and (3) the Sentence." It was generally the practice to issue a separate Warrant for each particular case;[1] but in February, 1687-8, James II. appears to have contemplated the establishment of a permanent Court for the trial of all matters, not only of discipline but of legal wrong, in which members of the Army were the defendants. A Warrant in these general terms was therefore issued, under which:—

46. I. A Council[2] of the Chief Officers of the Army, or a General Court-martial, consisting of fifteen members and a President, any five of whom, with the President, should form a quorum, to meet constantly every week, was constituted. Twelve General Officers were appointed to act each as President for one month together, according to the order of rank, and thirteen other Officers as Members or Judges of the Court. This Court so constituted was authorized (as was then usual with ordinary Courts-martial) to hear and examine, by affidavit[3] or otherwise, all such matters and informations as should be before them touching any misdemeanour or misbehaviour of any Officer or Soldier, as also such witnesses, upon oath, as might be able to give testimony concerning the same. After the hearing the Court was authorized to give judgment and sentence according to the Articles of War, and to put the same in execution, or in extraordinary cases to report the same to the Crown.

47. II. The same Court then had authority to inquire in like manner into all disputes and differences arising between an Officer or Private Soldier, or any other person not being in the Military Service, or touching any injury, hardship, or disorder whereof complaint should be made against any Officer or Soldier by such other person; and the Warrant directed the Court, after full examination and hearing of the said matters and persons, to report to the King, that he might give such further order thereon as to justice should appertain. The Judge

[1] See entry under date of 12 March, 1685-6, on the Articles of War before referred to in C. M. Bk. (114), p. 46.

[2] C. M. Bk. (114), p. 80.

[3] The Court proceeds on the best evidence it can obtain, King *v.* Suddis, 1 East. Rep., p. 310.

Advocate General or his deputy (approved by the Court) was always to attend ("as in all things he was bound to do according to the duty of his place") the order and to receive and observe the directions of the Court or its President.

48. This Court so constituted appears to have commenced its sittings "in the Great Room of the Horse Guards," on the same day on which the Warrant was dated, viz., 27th February, 1687-8, and had five recorded sittings on various subjects; the last entry being of a Court held on the 20th of April, 1688, in which a supposed religious difference between Roman Catholic and Protestant appears to have been brought to the notice of the Court. I am not aware that it ever caused any practical grievance to the Civil Community, but in adjudicating upon or seeking to redress the wrongs of the Citizen against the Soldier by remitting the case to the King instead of the Judges,—a departure was made from the fundamental principles of the Constitution, and the rule which the King himself laid down for the guidance of the Army after the Rebellion of Monmouth was violated.[1]

Directions issued in 1686 *by James II. with regard to Military Discipline.*[2]

In an Army the Council of War is always to meet at the General's quarters or tent, and none are to be called to it but the Lieutenant-Generals, the Major-Generals, the Brigadiers, and the Colonels and Commanders of Bodies when the matters concern their Regiments. Private Councils of War or Courts-martial in a Garrison are either held at the Governor's house, at the Morning Guard, or where the Governor orders; in a Camp, at the Colonel's tent, who causes notice to be given to the Captains to be present. When all are met, the Governor or General, or he who is to sit as President, takes his place at the head of the table. The Captains sit about according to their seniority; that is to say, the first Captain on the right of him that presides, the second on the left, and so of the rest; and

[1] Vol. I. p. 478, Letter to Col. Kirke, of July, 1685.

[2] This is printed from Grose, Vol. ii. pp. 137, 138, but I have failed to trace the original in the War Office Records.

the Town Major or the Assistant Major or Quarter-master of the Regiment, who, in the absence of the Judge Advocate, discharges his office, is to sit in his place at the lower end of the table. The Lieutenants, Sub-Lieutenants, and Ensigns have a right to enter into the room where the Council of War (or Court-martial) is held; but they are to stand at the Captain's backs, with their hats off, and have no vote. If the Council be called to deliberate on some matter of consequence, the President, having opened it to the Court, asks their opinions. The youngest Officer gives his opinion first, and the rest in order, till it come to the President, who speaks last; the opinions of every one being set down in writing. The result is drawn conformable to the plurality of votes, which is signed by the President only. If the Council of War or Court-martial be held to judge a Criminal, the President and Captains having taken their places, and the Prisoner being brought before them, and the information read, the President interrogates the Prisoner about all the facts whereof he is accused; and having heard his defence, and the proof made or alleged against him, he is ordered to withdraw, being remitted to the care of the Marshal or Gaoler. Then every one judges according to his conscience and the Ordinances or Articles of War. The Sentence is framed according to the plurality of votes, and the Criminal being brought in again, the Sentence is pronounced to him in the name of the Council of War or Court-martial. When a Criminal is condemned to any punishment, the Provost Marshal causes the Sentence to be put in execution; and if it be a public punishment, the Regiment ought to be drawn together to see it, that thereby the Soldiers may be deterred from offending. Before a Soldier be punished for any infamous crime, he is to be publicly degraded from his arms, and his coat stript over his ears. A Council of War or Court-martial is to consist of seven members at least, with the President, when so many Officers can be brought together; and if it so happen that there be not Captains enough to make up that number, the inferior Officers may be called in.[1]

[1] Reference may be made to 2 and 3 Edward VI. c. 2, sec. 8, and 5 and 6 Ph. and Mary, c. 3, secs. 4 and 5. Vol. 1. p. 352.

CHAPTER III.

THE MUTINY ACT.

1. THE political attitude assumed by the Regiments on the Scotch Establishment in declaring for King James II., and their open Mutiny in his favour, obliged Parliament to confer upon William III. those Statutory Powers for the suppression of Mutiny which are to be found in the Act printed elsewhere.[1] In the circumstances under which the country was placed, and regarding the urgency of the evil that needed an immediate remedy, no wiser measure could have been framed. In the short interval that elapsed between the appointment of the Commons' Committee to frame the Bill on the 13th and its acceptance by the Lords on the 28th of March, great Constitutional questions had to be debated and settled. Without giving any sanction to the undefined Prerogative of Proclaiming "Martial Law," or dealing with any other than those semi-political offences which then threatened the State with destruction, Parliament adopted—as will be clearly seen on a comparison of the Act with the preceding Articles of War—the existing Military Tribunals for their punishment; and, instead of exalting their own power by weakening that of the Crown over the Army, the two Houses confirmed and strengthened the latter by their Legislation.

2. In a carefully-worded Preamble, which, after nearly 200 years of party conflict, now remains, with but trifling amendments, as it was originally placed upon the Statute Book, the framers of the Act, while upholding the provisions of the Great Charter, "that no man should be prejudged of life or limb, or subjected to any kind of punishment by Martial Law or other-

[1] Vol. I. pp. 142, 497, and *post*, Appendix (A).

wise than by the judgment of his Peers and according to the known and established Law of the Realm," nevertheless declared the necessity, so long as the Army was on duty, "of retaining an exact discipline." Not dealing with mere offences against discipline, but with those only which would have rent the State asunder if Parliament had not declared in favour of William III., and constrained the Army to allegiance, they limited their enactment thus:—"That every person mustered and[1] in pay as an Officer or Soldier in the King's Army found guilty by Court-martial of exciting, causing, or joining in any mutiny or sedition, or of desertion from the Army, should suffer death or such other punishment as that Court should award." The effect of the Act was, therefore, to leave all ordinary Military offences to be dealt with, as heretofore, by the Crown alone, but to give Parliamentary sanction to the infliction of Capital Punishment for certain specified offences which, whether regarded as Military or Political, it was expedient should be summarily punished by Courts-martial.

3. Direct authority was then given to the King or to the General of the Army to grant his Warrant to Officers (not under the rank of Colonel) for assembling Courts-martial from time to time for the punishment of offenders. These Statutory (as distinguished from Prerogative) Courts were never to consist of less than thirteen Officers—of the rank of Field Officers for the trial of Field Officers, or of Captains for the trial of other offenders. In all cases they were to have the power of swearing witnesses giving evidence before them, and the life of the accused was guarded by other securities laid down in the Statute: thus, "where the offender may be punished with death," the Judges were to be sworn upon the Holy Evangelists "well and truly to try and determine according to the evidence the matters then pending between the King and the Prisoner:" —they were to proceed in the trial "but between the hours of 8 A.M. and 1 o'clock P.M," and nine of them at least were to concur in the Sentence. Lastly, the Act—as an experiment for the protection of the Civil Community—was limited to six months' duration.

[1] "Or" in the Mutiny Act till the 6th of Anne. Vol. I. p. 178.

4. The Act, however, contained (as will be seen) two other Sections, to which special reference must be made. Having, in the preceding Reign, established the Militia Forces under the discipline of the Lord Lieutenant, aided by the Civil Magistrate, Parliament did not see fit on this occasion to alter the relationship in which that force stood towards the Crown. A Declaration was therefore inserted that nothing therein contained "should extend or by any ways be construed to extend to or concern any of the Militia Forces of the Kingdom." The other Section, which was of far more importance, provided against a conflict of Laws—an essential Enactment now that Military Law was for the future to be established and carried into execution with Statutory Authority. Hitherto, though the Petition of Right had protested against it, the Sovereign had assumed to protect his Soldiers from the ordinary consequences of their improvidence or crimes. Thus in the matters (1) of Civil[1] Proceedings for the Recovery of Debts, to hold the same in abeyance by orders to the Sheriff, and (2) of Criminal Offence, to refer the consideration thereof in the first instance to a Court-martial for report, and then, on its report being presented to the Sovereign, to do justice as he deemed fit between the Soldier and Citizen. That no sanction whatever might be given to the assumption or to the theory that the Soldier—as then made legally subject to the Military—was not liable to the Ordinary Tribunals of the Realm, the Act made the Common Law supreme, by declaring "that nothing therein contained should extend or be construed to exempt any Officer or Soldier whatsoever from the ordinary process of Law."

5. Thus limited, it operated only on "the Standing Army within the Kingdom," and only for the punishment of certain specific offences enumerated. For these when abroad, or for smaller offences when at home, the Army was punished under the Articles of War put forth by the King or by the General Officer in Command. Whenever, after the 1st of William until the 12th of Anne, a Mutiny Act (though for some short periods none) was passed,[2] these provisions were re-enacted in nine Sections, without even verbal amendment.

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[1] Vol. I. p. 55. [2] Vol. I. p. 389.

6. Clauses relating to other matters than those of Military Discipline were from time to time added, until, at the close of Queen Anne's Reign, the Act contained enactments for Mustering the Army and for punishing false musters, for Billeting the Troops and payment for their quarters, for Impressment of carriages, and for many other miscellaneous necessities which had previously been regulated by Royal Warrants and enforced by Court-martial punishment without Statutory Authority. These it is not intended here to discuss, but it may be well to follow those Enactments which relate to Military Discipline until Articles of War for the Government of the Army at home—first during the Rebellion in 1715, and then in 1717—were put forth.

7. Viewed in this aspect, during the Reign of William III. the Act underwent little alteration. In the sixth,[1] but in no later one, a prohibition was inserted that no Officer of the President's Regiment should sit or vote on a Statutory Court-martial; and in the ninth and last Act,[2] the Sections relating to Mutiny and Desertion were extended "to such Forces as the King had then on Foot in Ireland." At the close of his Reign, the Duke of Marlborough was appointed to the command of the Army in Holland; and, by his Commission of June, 1700,[3] he had that authority which the King himself had formerly exercised, of making "Rules and Ordinances for the Government of the Army," and of punishing all convicted offenders against the same by Courts-martial. The Officers forming these Courts were to be Field Officers or Captains, "whereof seven at the least were to be a quorum, and to judge of all crimes against the said Ordinances by a majority of voices." The Sentence of the Court was to be put into immediate execution or to be suspended at the discretion of the General. Under Royal, and not under Statutory, Authority, the Army abroad[4] was governed, and throughout this Reign the Law remained substantially the same.

8. When Anne ascended the throne, amendments were introduced into the Act which must be noticed, as several of these

[1] 6 and 7 Will. and Mary, c. 8, sec. 3. [2] 13 and 14 Will. III. c. 2, sec. 33.
[3] Vol. I. p. 490. [4] Vol. I. pp. 187, 540; Vol. II. pp. 176-7.

in the Preamble are of Constitutional importance. In the first place, each Mutiny Act, after the first of Anne's Reign, was, by the insertion of an Introductory Clause, made both to define the purposes and to limit the numbers of the Standing Army. The purposes originally assigned in the Preamble[1] were (*a*) "the Present War, (*b*) the Safety of the Kingdom, (*c*) the Common Defence of the Protestant Religion, and (*d*) the Reduction of Ireland." Ireland being reduced, the (*e*) "War with France" was assigned for (*d*), and continued in the Preamble till 1701, when (*f*) "the Preservation of the Liberties of Europe" was placed in it.[2] In 1705[3] and until 1710, "the time of War" justified the continuance of the Army for the purposes previously alleged; but in 1711, as War could not be referred to, the original purposes (*b, c, d, f*) were retained. In 1712[4] the necessity for the continuance of the Army was placed on more intelligible grounds, as (*g*) "a Guard to Her Majesty's Royal Person, (*b*) the Safety of this Kingdom, and (*h*) the Defence of Her Majesty's Dominions beyond the Seas." During the Rebellion of 1715[5] (*i*) its suppression was substituted[6] as the reason for the continuance of the Army, but in the Act of 1716[7], the Rebellion being suppressed, was of necessity abandoned, leaving (*g*) "the Guard" and (*b*) "the Safety" as the only reasons for the Army, until, in 1726, Parliament settled down "to the Preservation of the Balance of Power in Europe,"[8] which remained for many years in the Preamble.

9. The limitation of numbers was first introduced when the Preamble, in the Act for 1712, affirmed "it was judged necessary that a number of Troops, *not exceeding* 8000 men, be kept on Foot" for Guard and Safety, "and also a certain number (which was undefined) be kept for the Defence of His Majesty's Dominions beyond the Sea."[9] This limitation created a Parliamentary Compact, that no larger number of Soldiers than was here stated should be continued on foot by the Crown during the period of time to which the Act had reference.[10]

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[1] 1 Will. and Mary, Sess. 2, c. 41. [2] 1 and 14 Will. III. c. 2.
[3] 4 and 5 Anne, c. 22, and 9 Anne, c. 9. [4] 12 Anne, c. 13.
[5] 1 Geo. I. and II. c. 34. [6] In lieu of (*h*). [7] 3 Geo. I. c. 2.
[8] 13 Geo. I. c. 4. [9] 12 Anne, c. 13.
[10] Vol. I. pp. 86, 94; p. 262, *note*; Vol. II. p. 128.

Nor was it till the year 1814 that all the several Establishments for Troops abroad or elsewhere were thrown into one Establishment available at any part of the Empire.

10. The next amendment in the same Act has an important bearing on the general powers of the Crown to declare Martial Law, for in the second paragraph of the Preamble,[1] the words "in the time of Peace" were inserted after "subjected," and "within the Realm" after "punishment." The Crown, therefore, was no longer restricted by *Statute* from exercising the power (if otherwise valid) of declaring Martial Law in times other than those of Peace, or in places other than within the Realm. As the Act was also extended to Ireland, the Preamble was further amended by inserting after "Service" the words "within this Realm or the Kingdom of Ireland," and a Section added to the Enactments for carrying out this object.

11. Hitherto no statutory provisions had been enacted for the Government of the Army out of England, but, to effect this object, Sections (36 to 38) were introduced into the same Act, which enabled the Court of Queen's Bench or the Justices of Assize (with a Jury of the County in which the Court happened to be sitting) to punish any Officer or Soldier who out of England or on the high seas should (1) hold correspondence with any Rebel or Enemy, or (2) raise Mutiny or Sedition in the Army, or (3) refuse to obey his Superior, or (4) resist any Officer in the execution of his Office—the offence first mentioned as high treason, and the others as felony.

12. Neither had any reference whatever been made in prior Acts to the power which the Crown had exercised of issuing Articles of War, though it must have been within the cognizance of Parliament that such had been issued, and that the Army was in fact governed by them. In the Act which we have now under consideration, this reserve was broken, and a Declaration inserted that nothing in it should be held to abridge His Majesty's power to establish Articles of War, erect Courts-martial, and inflict penalties thereunder, as might have been done beyond the seas in time of War before the Act was passed.[2] To enforce these Articles in this country, and for the punish-

[1] 1 Anne, sec. 2, c. 20.

[2] Sec. 39.

ment of crimes and offences committed against them abroad, the Crown was authorized to erect Courts-martial[1] here; and as Desertion from the Army abroad was not a Statutory offence under any prior Mutiny Act, this one provided that, upon sworn information, a Justice might "for example's sake" send any such Deserter before a Court-martial to be transported to his Regiment for punishment.

13. The Law, as I have here defined it, remained without alteration during the Wars of Marlborough, but after the Peace of Utrecht the Mutiny Act needed several revisions. The tenth Act of this Reign[2] was the first ever passed for the Government of the Army in time of Peace, and was intituled "An Act for the better Regulation of the Forces." Death as a punishment was altogether withdrawn from the Military Code; and this leniency was the chief cause (if we may believe the Duke of Newcastle speaking before Parliament in 1749[3]) of the Rebellion of 1715. The theory which this Act (the 12th Anne) originated with an intention of mercy became in effect, by the substitution of punishment in the next Reign, a means of cruelty. It placed all crimes in one class or category, and for any offence limited the punishment to such as should "not extend to life or limb." Therefore for Mutiny, Sedition, or Desertion (theretofore punishable by death with a discretion to inflict a lighter punishment), or for refusal to obey, drawing or lifting a weapon against, or resisting an Officer, the same measure of punishment was declared, viz., such as should not "extend to life or limb" of the offender. The Crown thus became powerless to suppress the political action of the Army in favour of the Pretender, through the Agency of Military Tribunals.

By the same Act, a general power[4] was given to inflict Corporal Punishment by a Court-martial "for immorality, misbehaviour, or neglect of duty"—words which enabled the Crown to enforce against the Soldier the obligation which by the terms of his enlistment was laid upon him to serve the Crown faithfully.

14. The discipline of the Army abroad was left entirely in

[1] Sec. 41. [2] 12 Anne, c. 13. [3] 14 Parl. Hist., p. 441. [4] Sec. 3.

the hands of the Crown (those Sections giving a Jurisdiction to the Queen's Bench and Justices of Assize being withdrawn), and an express legislative power—though limited—was conferred upon the Crown to make Articles of War; to constitute Courts-martial for the trial of any crime or offence by such Articles, and to inflict penalties by sentence of such Courts: the power being expressly limited in its terms to the Dominions of the Crown beyond the sea (Ireland excepted), and was to be exercised as theretofore it had been exercised beyond the seas in time of War.

15. The Reign of George I. was the advent to Civil Commotion, and in the year three separate Mutiny Acts were passed. The first Act,[1] which received the Royal Assent on the 3rd June, bore the same title as, and was a renewal of, the mild Code of the 12th Anne; but, after a message from the Throne had announced to both Houses that a Rebellion was imminent, a Bill for "the better preventing Mutiny and Desertion" was passed, and received the Royal Assent on the 2nd of August. This second[2] was the re-enactment of the original Act of 1689, with a protecting clause against actions at Law, and another giving express authority to the Crown (in wider terms than would now be sanctioned) to make Articles of War under Royal Sign Manual for the better Government of the Forces at home.

16. The third Act, which received the Royal Assent on the 23rd March, 1715 (O.S.),[3] stamped upon the Military Code that penal character which for some years made it a reproach to an Englishman to be a Soldier. Under the previous Acts two separate Codes existed: the mild one of the 12th of Anne, and the severe one of 1689—made more severe by the almost unlimited power of the Crown to declare new offences by Articles of War. This (third) Act adopted one classification of crime, and one measure of punishment; but, in lieu of that contained in the 12th of Anne, substituted Capital Punishment for every offence, but with a discretion to award such other punishment as the members of the Court-martial should see fit. Thus "one of the glories of our English Law," as Black-

[1] 1 Geo. I. sec. 2, c. 3. [2] Ib., c. 9. [3] Cap. 34.

stone terms it—viz., an ascertained quantum of punishment for every offence imposed according to the rule of Law, and not at the caprice of the Judges[1]—was extinguished, for, as he adds, if punishments are to be the private opinions of the Judge, then "men would be slaves to their Magistrates, and would live in Society without knowing exactly the conditions which it lays upon them." Such, however, was the condition of the Army, so long as this Statute remained in force.

17. After the Rebellion had been crushed, it was the duty of Parliament to take under review the powers which in an emergency had been conceded to the Crown for the government of an Army, the main body of which had disappointed the rebels by their faithful discharge of duty,[2] though some members had been found guilty of desertion and punished with death.[3] At that period many Constitutional objections were urged which have prevailed against the Military Code as embodied in the Mutiny Act and Articles of War; but as it would be tedious to carry down in detail the history of each modification as and when made, I propose here to state briefly a few of the principal subjects of controversy, and to show how these difficulties were either then or subsequently disposed of.

18. Unfortunately the very existence of the Army was a subject of controversy; for, had the necessity of its continuance been admitted, the difficulties incident to legislation would have been materially lessened. As it was, a strong minority would have gladly seen the Military strength of the Crown first diminished, and then altogether extinguished. To legislate for Army Government was therefore distasteful to many, who were apprehensive[4] that in giving Statutory powers to the Crown for the punishment of the Soldier they were incidentally both sanctioning and perpetuating the principle that a Standing Army was essential for the protection of a free maritime State.

19. But, waiving these considerations and accepting for some time at least the incubus, first of 7000, and ultimately of 17,000 men, dispersed as Guards and in Garrisons throughout the kingdom, were they to be organized in localities and governed by the

[1] Vol. iv. Com., p. 371; and Debate of 1749, in Vol. I. p. 163.
[2] Vol. II. p. 164. [3] Vol. I. pp. 179, 372; Vol. II. p. 258. [4] Vol. I. p. 196.

Civil Magistrate as the Militia; or were they to have "Articles and Orders" enacted[1] by Parliament for their discipline, as was the case with the Royal Navy? These were the preliminary difficulties needing solution. The localization of Regiments was urged by those statesmen who objected to our keeping up the Army as a separate caste, alienated from the habits and sympathies of their fellow citizens, and moved about from month to month, that no attachment might spring up between them. It was, however, opposed successfully by the Duke of Marlborough,[2] and abandoned. The government by the Civil Magistrate was for some time held in abeyance, but the vote in supply (which always precedes the Act) having established the Army for one year, Sir Robert Walpole used his influence in favour of the renewal of the Mutiny Act, pointing out that, as the Army existed, it ought, for the welfare of the State, to be kept in discipline by the Military, and not punished by the Civil Magistrate.[3] The analogy of the Navy, as a force permanent and constitutional, was not adopted; and therefore the proposal[4] to enact Articles of War for the Army met with little encouragement, and failed.

20. These points being settled, the real difficulties of the case presented themselves. Was Parliament to concede to the Crown legislative power to declare offences—to erect tribunals —and to inflict punishments, contrary to the fundamental principles of English justice? A precedent could certainly be cited, where an English Sovereign had obtained such powers from a "servile" Parliament,[5] but only in the time of arbitrary power and when Parliament scarcely existed for any other purpose than that of registering the ordinances of the Sovereign. The Articles of War hitherto made by the King had been (as we have seen) issued as Military Orders which, under his oath of allegiance and service, the Soldier was held bound to obey; great caution was therefore needed in giving legislative sanction to such rules.

21. No such caution was, however, exercised; for Parliament enacted[6] that the King might establish Articles of War, and

[1] 13 Car. II. c. 19. [2] Vol. I. p. 218. [3] Vol. I. p. 153. [4] Vol. I. p. 147.
[5] 31 Henry VIII. c. 8, and see Hallam 'Const. Hist.,' Vol. i. p. 35.
[6] Vol. I. p. 146.

constitute Courts-martial, with power to try *any* crime or offence and to inflict any penalties. It is therefore scarcely to be wondered at that a power so unlimited in its extent and meaning should have formed a subject of Parliamentary controversy until restrained. This was done in the year 1749, when a proviso[1] was inserted "that within Great Britain and Ireland" no person should be adjudged to suffer any punishment extending to life or limb except for such crimes as are so expressly punishable by the Mutiny Act—a protection which, limited as originally framed,[2] is still to be found in the Act of 1872.[3]

22. The legitimate object of the Military Code is the punishment of those crimes which—as not being within the cognizance of the Civil—would but for the establishment of Military—Tribunals, go unpunished.[4] It is an usurpation if by that Code the Soldier is exempted from any liability, Civil or Criminal, to which by his acts or defaults he has subjected himself under the ordinary Laws of the Realm. This fundamental rule—placed upon the Statute Book when the Mutiny Act of 1689 received the Royal Assent—was infringed by the Military Code of George I., both in respect to (1) the punishment for criminal offences, and (2) for the recovery of civil debts.

I. As to Criminal Offences.

23. The 18th Article of War (1717) ordered the Commanding Officer of every Regiment to give up the accused who committed any crime punishable by the known laws of the land, *and* not expressly mentioned in the Articles, to the Civil Magistrate, for trial; assuming, as the words of the Article did assume, that Courts-martial had pre-ordinate jurisdiction in all cases in which an offence was created by Articles of War. The Mutiny Act[5] also gave any one accused before the Civil Courts the benefit of his Court-martial acquittal, by declaring such acquittal to be a full bar to any indictment or proceeding for the same offence before a Civil Tribunal. Moreover the jurisdiction assumed by Courts-martial to try offences (of immorality or misbehaviour) committed by a Soldier against a fellow-citizen was calculated

[1] 22 Geo. II. c. 5, s. 57; Vol. I. p. 147.
[2] See King *v.* Suddis, 1 East. Rep., p. 310. [3] Sec. 1. [4] Vol. I. p. 158.
[5] 4 Geo. I. c. 3, s. 41.

to obstruct or supersede the ordinary Tribunals, so that many grievous offences might remain unpunished.[1]

24. The Remedy for this infringement of the Municipal Law was commenced in 1718 by Parliament declaring in the Mutiny Act, 1st, that any Soldier accused of a Criminal offence punishable by the known Laws of the land should be given up to the Civil Magistrate by the Commanding Officer, under the penalty of his being cashiered for neglect or refusal;[2] and 2nd, that no person convicted by the Civil Magistrate should be liable to Court-martial punishment, save that of cashiering, for the same offence.[3] It was completed in 1721, when the clause giving the accused criminal the full benefit of Court-martial acquittal was withdrawn from the Act.

25. An exception, however, in the interest of discipline, if not of morality, was made by the Articles of 1717,[4] which has been continued, and is found in the Military Code of 1872. It was first provided that in Gibraltar, and other foreign stations where the Army was quartered, and "where there was no form of Civil Judicature in force, the Generals or Commanders should hold General Courts-martial and punish Criminals by their sentence, as had been practised theretofore and authorized by former Articles of War":—a power which assumed a more definite shape in 1750, for the Articles[5] gave the same Court jurisdiction "to try all persons guilty of Wilful Murder,[6] Theft, Robbery, Rape, Coining[7] or Clipping[8] Coin, and all other Capital Crimes or other Offences, and to punish Offenders as the nature of their Crimes should deserve." The Articles of 1784 somewhat altered this language by giving Jurisdiction if a person was "accused" (though possibly not "guilty") of the Crimes enumerated in both Articles, and "of having used violence, or committed any offence against the person or property of any of our subjects, or of any others entitled to our protection." The sentence of death was also authorized, with

[1] See Lords' Protest, Vol. I. p. 159. [2] Ib. p. 508, Rep. of 1721.
[3] Ib., p. 160. [4] 18 Com. Journ., p. 713. [5] Sec. 19, Art. 2.
[6] Murder in Placentia in 1733, Vol. I. p. 529.
[7] As to coining in Flanders in 1736, Vol. I. pp. 533, 534.
[8] As to clipping at Ghent, 1745, Vol. I. p. 535.

a discretion given to the Court[1] of awarding such other punishment as the nature and degree of the offence appeared to justify.

26. Such continued to be the Law until the extreme difficulty of punishing Soldiers for Civil Offences in the Field by summoning a full General Court-martial was represented during the Peninsular War by the Duke of Wellington.[2] Parliament, therefore, in 1813, passed a special Act[3] giving additional Power for the punishment of such Crimes by enabling a Commanding Officer serving out of the Dominions of the Crown, on receiving a Complaint of any Crime or Offence committed against the person or property of any inhabitant or resident in such Country by any person serving with or belonging to the Army in the Field, to summon a Court-martial of not less than three Officers for the trial of such Offender, and to award against him such punishment as the Mutiny Act or Articles of War prescribed. This enactment was incorporated in the Mutiny Act[4] of 1814, and remains upon the Statute Book in 1872.

27. Another exception in the interest of discipline was first made in the Articles of 1742, which has also been continued in those of 1872. In the earlier Code[5] it was provided that "every Non-commissioned Officer or Soldier found guilty by a Regimental Court-martial of pilfering and stealing his comrades' or other Soldiers' clothes, arms, or accoutrements, should be put under weekly stoppages to replace the same, and suffer such confinement or corporal punishment as the Court should award." This was incorporated into a later Mutiny Act, and in that of 1833[6] was extended to the property of an Officer or a Military Mess; and generally to petty offences of a felonious or fraudulent character, to the injury of, or with intent to injure, any person, Civil or Military; the Jurisdiction being by the same Act transferred to a District Court-martial. In 1847 the word "petty" was omitted, under the advice of the late Mr. Charles Buller—which gave the Jurisdiction of the Court-martial a wider application than was originally intended. A

[1] See the case of King *v.* Suddis, 1 East. Rep., p. 310; on this Art., Sec. 22, Art. 4 of 1784, and Sec. 24 Art. 4 of 1800.

[2] Correspondence printed; and Vol. II. p. 666.

[3] 53 Geo. III. c. 99.

[4] 54 Geo. III. c. 25.

[5] 1742, Art. 41.

[6] Sec. 9.

General Order was, therefore, issued in November, 1851, that a Court-martial should be had recourse to "only where the Civil authorities declined or omitted to prosecute, or where from circumstances, which render it difficult to bring the case before the Civil Courts, it may be necessary for the ends of Justice and the maintenance of discipline to resort to trial by Court-martial." In 1860, this power was transferred to the Articles of War, and these were altered in 1862[1] as they now stand in 1872.[2]

II. As to the recovery of Civil Debts.

28. The arrest of the Soldier for debt involved different considerations. In the first place, where Conscripts had been impressed, or Felons (to escape the punishment of death) or Insolvents (that of perpetual imprisonment) had entered the Army, it was important to society to keep them there. On the other hand, men (then as now) might enlist into the Service with no other object in time of Peace than to escape the legal consequences of pecuniary embarassment; and the enlistment, with unlimited furlough, might be fraudulently urged against the honest claims of creditors. The action of Parliament was directed to these ends, to prevent the Soldier first from being trusted, by ordering his Officer to cry down his financial credit in each town which the Regiment entered, and afterwards from being taken out of the Army (by those who had wrongfully trusted him) to the injury of the Public Service.[3] Thus the 3rd Act of George I. (1715) declared that no "volunteers" should be taken out of the Army by any process other than for Criminal matters, and the Act of 1717[4] authorized any Justice to discharge such prisoners from arrest without the payment of any fee.

29. As applied to "volunteers" only, society was safe from the release of Convicts or of imprisoned Debtors; but it placed every Soldier out of the reach of Law in regard to making any pecuniary compensation for torts committed or for any other legal obligations contracted by him. The Lords made this grievance a subject of "protest,"[5] and Parliament endeavoured

[1] Art. 85. [2] Art. 81. [3] Vol. I. p. 208. [4] Vol. I. p. 209. [5] Vol. I. p. 209.

to meet the difficulty in both aspects, first by enabling just debts to be recovered, and then by preventing the Soldier from being withdrawn from the Army by an arrest fraudulently arranged with a conniving Creditor. The Act of 1717 [1] accordingly provided that the debt or damages should amount to £10 at the least, and be proved on oath. This principle of exemption—extended both to the amount and nature of the obligation as well as the persons entitled to it—has been continued in the Mutiny Act of 1872, though it may be questioned whether, in regard to the present necessities of the Military Service, the exemption be either needed or ought to be countenanced by the State.[2]

30. But here (as in the case of crime abroad, and for the same reason) an exception to the ordinary Law has been created, and a jurisdiction in recent years has been given to a Tribunal of Military Officers to adjudicate on the Civil claims of Creditors against the Officers and Soldiers of the Army serving in India. In the year 1823 such a provision [3] was made for the recovery of debts not exceeding 400 sicca rupees before a Military Court of Requests, where the Army was quartered beyond the jurisdiction of the Civil Court established for Calcutta, Madras, and Bombay, and these Clauses transferred (from a subsequent Act) stand part of the present Military Code of 1872.

31. To revert to the Code of 1715. The 3rd Act not only too frequently and for trifling offences awarded the punishment of death, but a provision (which was to be found in it), enabling the Crown, or Military Officers, to declare the causes of death, presented a far more serious objection, thus: "Every Officer or Soldier who should refuse to obey the Military orders of his Superior Officer" was liable to capital punishment. The Army being then under the personal command of a Sovereign, absolutely irresponsible—for, according to our Constitutional theory, he could do no wrong—the danger of this enactment was not exaggerated by the Lords, when, in their protest, they declared it to be a violation of the fundamental Laws of the Realm, "by which the commands or orders of the Crown are bound and

[1] 4 Geo. I. c. 34, s. 47. [2] Vol. I. p. 211. [3] 4 Geo. IV. c. 81, secs. 57, 58.

restrained within the compass of the Law; no person being obliged to obey them if illegal, but punishable by the Law should he do so, notwithstanding such orders or commands proceed from the King."[1] However oppressive to the Civil Community, or coercive against Municipal rights or institutions, the Inferior must obey the orders of his Superior Officer at the peril of Capital Punishment by a Court-martial summoned at his instance. And his injured fellow-subjects were left without legal redress,[2] because the same Act contained, as we have seen, clauses which practically exempted the Soldier from trial by the Civil Tribunals.

32. The alterations made in the Act of 1718 placed some limitation upon this penal obedience by using the words "who shall refuse to obey any *lawful* command of his Superior Officer." In 1733 the increase of the Army was opposed by several speakers, mainly from the danger to which this authority over the Army exposed the State. Discontent continued to be expressed until, in the year 1749, after an angry debate, the words were altered thus: "To disobey any lawful command of his Superior Officer," which now stand in the Military Code of 1872[3]—a slender security in itself against the perpetration of an irremediable act of violence, should the lawfulness of the command be of a doubtful or controversial character,[4] and one of little practical value should the Officers who give the commands be desperadoes instead of gentlemen.

33. But the Code, the method of administering Military Justice, and the infliction of severe punishments, gave rise to continuous controversy during the last century.

"The first maxim of a free State," wrote Paley, "is that the laws be made by one and administered by another set of men —in other words, that the Legislative and Judicial characters be kept separate.[5] The next security the independency of the Judges;" but in the Military Code the political *virus* was to be found not only in this implicit obedience to the law made

[1] Vol. I. pp. 157-164; Vol. II. pp. 66, 144, 154.

[2] 1 Geo. I. c. 9, s. 10, and c. 34; s. 40.

[3] Mutiny Act, s. 15, Art. of War 38.

[4] Vol. I. p. 159, and Vol. II. p. 143.

[5] See Sir Charles Napier's definition of "Martial Law," Chap. VIII., par. 14, *post*.

by the Royal Command, but in the facility for the punishment of disobedience, or of quasi political crimes, by Military Tribunals convoked under the same Royal authority. In the first year of William III.'s reign a Commission[1] was given to several General Officers attached to his dynasty to visit and review the Regiments quartered throughout the country. They were to enquire of the gentlemen of the county "what Officers and Soldiers have given any cause of being suspected of being disaffected to *our* Government," and in case they found "them unfit to serve in respect of their disaffection to our service," they were to disband them. This Commission was dated the 10th; but on the 22nd of May, 1689, another Commission was issued to the same Commissioners, enabling them to summon Courts-martial under the Act to hear and examine all such matters and informations as should be brought before them touching the misbehaviour of any Officer or Soldier by Mutiny or Desertion.[2]

34. Both before and after the passing of the Act, the records of Courts-martial[3] show that offenders were brought before these Courts for offences of Sedition which might reasonably have been punished by the Common Law Tribunals, if the evidence and crime had been such as to satisfy the Jury that the accused deserved punishment. Parliament was therefore naturally jealous of extending a system of Judicature which—though adopted for and in a national emergency—had a political significance, and placed (as the Army increased or the operation of the Act was extended) a large number of ther fellow-citizens under a political interdict.

35. It need not be a matter of surprise to learn that the extension of the Military Code to persons other than Officers and Soldiers in pay was most narrowly watched in Parliament until the punishments were mitigated and the Administration of Justice settled in public confidence. The first Extension was in 1708, when those serving as "Volunteers" without pay were brought under the Act,[4] then in 1715,[5] by the 3rd Act the "Invalids"—that is, Corps or Regiments composed of

[1] Vol. II. p. 356. [2] C. M. Bk. (114), p. 89.

[3] James II., Vol. I. p. 476; Geo. I., *ib.* p. 519; and see the Jamaica Court-martial at Morant Bay, Vol. II., pp. 177, 490-497.

[4] Vol. I. Chap. VIII. par. 98. [5] Ib., par. 99.

Pensioners acting under the command of retired, reduced, or half-pay Officers, who thus originally became liable to trial by Court-martial and so continued until 1783—were included. In 1754, the Local Army of the East India Company was brought under a special Mutiny Act,[1] and in the same year the Local Troops raised to serve with the British Army by the Governors of the American (in 1807[2] extended to all) Colonies, were brought under the Imperial Act.[3] Within two years, by the Militia Code of 1756,[4] the English Militia, hitherto exempt, were made liable to the Act, and the last great Constitutional struggle was on Mr. Fox's opposition, in 1788, to the enactment making the Civil Artificers—then to be enlisted as Sappers—liable to Military Law. From this period Parliament has manifested what by contrast appears to be a singular indifference to the extension of the Act.

36. It is a matter of surprise that no more effectual effort was made to frame and enact a classification of crime or punishment other than that laid down in the 3rd Act of 1715; for "one of the greatest advantages of our English Law is that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious—nothing is left to arbitrary discretion—the King by his Judges dispenses what the Law has previously ordained, but is not himself the Legislator."[5] No such attempt has been made, nor has Capital Punishment been withdrawn from the Statute Book, in regard to Military as it has for Civil Crimes. The reform of the Criminal has not reached the Military Code.

37. But the punishment of death, though often awarded by Courts-martial for Desertion and sometimes for Sedition (as cursing his Majesty[6]) was not always carried into execution. When several men were sentenced for one common offence, an expedient was resorted to—as early as the reign of William and Mary, and continued in the Service during the Peninsular War—of ordering the condemned criminals to draw lots for their lives. Thus, in 1696-7, William III. extended his mercy to two out of three prisoners, by "ordering the three condemned Sol-

[1] 27 Geo. II. c. 9. [2] 47 Geo. III. c. 32, s. 100. [3] Sec. 74 of 28 Geo. II. c. 4.
[4] 30 Geo. II. c. 25. [5] Blackstone (1756). Vol. i. p. 415. [6] Vol. I. p. 519.

diers to draw lots, and that he only on whom the lot of death do fall be executed;"[1] and the Duke of Wellington, in 1813, having pardoned some and ordered others for execution, added to his orders, "That the remainder of the prisoners should draw lots for one more to be executed by being shot according to the Sentence of the Court-martial."[2]

38. Again, by the Sovereign or the General in Command, "Corporal" was substituted for "Capital" Punishment awarded by the Court, the prisoner escaping with his life after a thrashing.[3] For many years there was no legal sanction for this course, and the Crown was advised in George I.'s reign that though the Sentence might be remitted it could not be changed.[4] "Let the prisoners," wrote the Duke of Wellington, "have the choice of suffering Corporal Punishment, or to be executed according to sentence. Those who prefer to be executed are to be shot; those who prefer corporal punishment are to receive a punishment not exceeding 300 lashes."[5]

39. Death for Desertion—which might not be too severe a punishment where the Soldier went over from the Army of the House of Orange or of Hanover to that of Stuart during the last century—was gradually withdrawn from the Code. First, in 1766, a discretion was given to Courts-martial, in cases where they thought death too severe a punishment, to award transportation for life or for years in Regiments serving abroad; and then, in 1803, Desertion was declared Felony, punishable with transportation. If the man wrongfully returned to this country, the Capital Punishment was then to be inflicted; but, as a rule, such punishment for ordinary Desertion ceased to be inflicted.[6]

40. Corporal punishments of various kinds, "not extending to life or limb," could, as we have seen, be inflicted by Courts-martial for "immoralities, misbehaviour, or neglect of duty;" but first the commutation, and later the abolition of this punishment was steadily sought from Parliament. In 1812 both Houses accepted the principle that "imprisonment might be inflicted as an alternative punishment for minor offences," and a limitation was first imposed upon the number of lashes to be

[1] Vol. I. p. 504. [2] Desp., Vol. vii. p. 177. [3] Vol. I. p. 518.
[4] Desp., Vol. vii. p. 510. [5] Desp., Vol. vii. p. 177.
[6] Vol. I. pp. 154, 503; Vol. II. pp. 3-41.

inflicted,—300 being fixed upon as the limit. From that time the controversy raged with more or less earnestness, until in the year 1868 the power to sentence any Soldier to Corporal Punishment for any offence whatever committed during the time of Peace within the Queen's Dominions was withdrawn from the Act.[1]

41. Whatever party-strife hitherto hinged on the yearly renewal of the Act has now ceased. Did the Bill precede or form one of supply, a successful opposition would disband the Army; but this is not so, for when the resolution which defines the number of men has been brought up and read a second time, then leave is given to bring in, and this number is stated in the Preamble of, the Mutiny Bill.[2] The Army, therefore, would be paid out of the supply, and its discipline be imperfectly maintained under the prerogative if the Mutiny Act were not passed. The effectual opposition is that made in the Committee of Supply either to the number of men, or to the period for which the vote is taken. The supply has therefore been granted for shorter periods than a year to oblige the Ministry to meet Parliament within that interval, and as the Mutiny Act follows upon supply its operation has been restricted to the same period.[3]

42. It is a rule established by Parliamentary usage, that nothing foreign to the subject or novel in principle, so as to lead to great delay or controversy, should be introduced into the Bill; for, if passed, the Act should come into immediate operation when the old one expires. The Roman Catholic Question was raised by Clauses in the Mutiny Bill, but withdrawn. In the same year (1806) the House objected to the principle of limited enlistment being so raised. In 1847[4] when the latter subject was again brought before Parliament, a Bill was presented in which the purposes of the Government were fully discussed, and, being adopted, were incorporated into the Mutiny Act of 1848.

43. From what has been written, it will be understood that the Bill always originates in the Commons; and so inflexible is

[1] 31 Vict. c. 14, s. 22.
[2] Vol. I. p. 86.
[3] Instances quoted, Vol. I. pp. 86, 190, 399.
[4] Ib.

the rule, that the amendments of the Lords on a Penalty Clause have been objected to, and their vote, either affirmative or negative, insisted upon. The first Bill was referred, after the second reading, to a Select Committee,[1] and in later periods it has been introduced by and carried through the House under the charge of the Civil Ministers[2] of the Crown. The Articles of War, on the contrary, were prepared by or under the advice of a Board of General Officers,[3] and were issued as Military Orders under Royal Sign Mannal, but without the countersign of a responsible Minister. In 1794,[4] Parliament provided that they should be judicially noticed, and in 1810[5] that they should be sent "by the hand of the Secretary at War to the several Judges of the Common Law Courts." Both the Acts and Articles are evidenced (as ordinary Statutes) by the type of the Queen's printer.[6]

[1] 10 Com. Journ., p. 53. [2] Vol. I. p. 144. [3] Letters of 1715, Vol. I. p. 505.
[4] 33 Geo. III. c. 9, s. 55. [5] 50 Geo. III. c. 71, s. 31.
[6] King *v.* Holt, 5 Te. Rep., p. 442.

CHAPTER IV.

THE MILITARY CODE AFTER THE MUTINY ACT, 1689.

1. IN entering upon the consideration of Military Law after the passing of the Mutiny Act, it may be well to revert to the subject which closed our enquiry upon the Military Law before that event, viz., the method of Judicial Procedure by Courts-martial, with the view of ascertaining from the Records of those Courts, still extant at the War Office, whether any, and what, changes were, in fact, introduced after (say from 1689 to 1695) and as a consequence of that measure. Now these entries, before and after the change of Dynasties of which the Act was a consequence are continuous—similar in their contents—so that no substantial alterations in the then existing practice or mode of procedure were caused by the Act, so far as these records avail us for information.

2. And here I may observe that the evidence, recently laid before the late Court-martial Commissioners to this effect, "that for the first twenty-eight years, from 1689 to 1717, there was a Mutiny Act alone, without Articles of War," does not appear to me to be consistent with these Court-martial Records. It is clear that Bruce, when writing his 'Military Institutes'[1] in 1717, had before him a printed copy of the Articles of War made by Queen Anne, for his quotation from the 52nd of those Articles—"that the Officers on Court-martial duty should be sworn not to receive any present or gratuity, directly or indirectly," for the discharge of their Office—is precise, and not to be found in the Military Code of the succeeding Reign. Added to which, during these twenty-eight years, the Mutiny Act was not always in force; and when in force, as contrasted with the

[1] See p. 308.

Articles of War, provided only partially for the Military discipline of the Army: nor can I see how the six disciplinary sections contained in it could either supersede or answer the necessity of a more complete Code of Law.

3. For the trial of offences, made capital, the Act was, in the first instance, recited [1] in the Court-martial Warrant, and in later practice, annexed to it [2] for the guidance of the General Officer, to whom the Warrant (under Royal Sign Manual and countersign) was addressed. To the Court, as theretofore, a discretion was given in criminal cases [3] to take evidence, either *vivâ voce*, by affidavit,[4] or otherwise, and power was originally given to inflict immediate punishment according to the provisions of the Statute. Articles of War were, however, soon put forth by William III.,[5] restraining the execution of Capital Punishment until the proceedings of the Court had been submitted to the King, and his directions declared thereon.

4. For the trial of other offences, made punishable by "the Rules and Articles of War," Court-martial [6] Warrants were issued as formerly; and six—not thirteen—Officers were declared to be a quorum for such Courts. In course of time—as in 1695, when the King left for Holland—General Warrants [7] were issued for the summoning of Courts-martial for the trial "of all such matters and informations touching any crimes, misdemeanours, or misbehaviours amongst our Forces;" and authority was granted to these Courts "to give Judgment and Sentence therein according to the Mutiny Act (as far as it might relate thereto) or otherwise" according to "the Rules declared and applied for the better government of our Land Forces," leaving the proper constitution of the Court to the knowledge of those Officers who should act as Judges,[8] and sanction the

[1] Warrant of 29 April, 1689.

[2] Warrant of 9 February, 1696-7; and Vol. I. p. 503.

[3] Warrant to the Duke of Marlborough for Court-martial, (1) at Blackheath, 21 July, 1690, (2) at Portsmouth, 22 August, 1690.

[4] In cases of false Musters, the Judge Advocate General took the Affidavit at his Office, C. M. Bk. (114), p. 127.

[5] The 52nd Article. See C. M. Warrant, 15 July, 1690, C. M. Bk. (114), p. 105. Articles were also issued for the Troops in Holland, ib. p. 114.

[6] Warrant of 26 February, 1693-4, p. 119. [7] C. M. Bk. (114), pp. 132-133.

[8] Attorney General's Opinion, 1694, Vol. I. p. 502.

infliction of punishment. In this manner, the Military Code (whether under the Act or Articles) became one in its administration—varying from the purely prerogative Code in the increased severity of its punishments; for as death could be legally—so, in practice, it was frequently—inflicted under the Mutiny Act for offences which never should have been so punished.[1]

5. The only practical effect of the Act during the reign of William III. was to give legal sanction to the infliction of Capital and Corporal Punishments by Courts-martial in time of Peace on Soldiers for political offences, quasi-military in their character. There was, certainly, no intention to alter the nature or constitution of those Courts, nor in any degree to assimilate them to the ordinary (Legal and Equitable) Courts of the Realm. The well-known Commentator, 'On the Laws of England,' described these Military Tribunals as "sui generis:" originally they were no Courts, except "of discipline and honour," but by the Act they became legally constituted Tribunals for the public safety—so far as the maintenance of the Army within the strict rules of discipline conduces to that object. Hitherto they have admirably fulfilled their end: for where, but in England, has an Army been found which at all times has been loyal to the Throne, and yet subservient to the Common Welfare of the People?

6. In all the ordinary Courts of the Realm, the Crown has delegated to the Judges its whole Judicial Power;[2] but this is precisely what the Crown has not done, or ever yet been advised to do, in the case of Military Tribunals. As responsible to the Civil Community for the discipline of the Army, the Crown and the Military Officers under the Crown must hold supreme power over it, and hence "the discretionary power of Courts-martial is guided," as Blackstone remarks, "by the directions

[1] Col. Gibson's Letter to Queen Mary, 1693, Vol. II. p. 41, and see Vol. I. p. 503.

[2] "And the Judges informed the King [James I.]," wrote Lord Coke, "that no king after the Conquest assumed to himself to give any judgment in any cause whatsoever which concerned the administration of Justice within the Realm. And the King cannot arrest any man, for the party cannot have a remedy against the King; so, if the King give any judgment, what remedy can the party have?"—Prohibitions del Roy, 12 Co. Rep., p. 63; and Chap. VII. par. 6, *post*.

of the Sovereign." To aid rather than control this authority, these Courts have been instituted; and hence no Sentence of a Military Tribunal can be carried into effect without a prior confirmation of all its proceedings by the author of its Jurisdiction, from whom (either as King, General, or Colonel) the delegation came. The Despatches of the Duke of Wellington and the Records of Sir Charles Napier's Indian Command will show how essential—for the maintenance of the discipline of an Army in the Field—it is that his supreme power should be vested in the General and not in the Courts-martial.

7. The principle adopted in the Mutiny Act is that which has prevailed in the Army since the Reign of Charles I. At that time, both the Royal and Parliamentary Forces, though fighting under opposing Standards, were governed by a Code nearly identical in terms, and the essence of Judicial administration in both Armies was that the Officer must be supreme.[1] On this principle of the Act no better legal commentary is to be found than in the Judgment of Lord Loughborough in the great case of Grant *v.* Gould, already quoted; nor can anything be clearer than that the equality of right or status, which is justly upheld before the Civil, does not exist before the Military Tribunals, as sanctioned by the Legislature. There the relationship is essentially that of subordination, and hence these Tribunals can only be put in motion at the will of the Superior—to maintain discipline over the Inferior. No doubt, under certain given circumstances, a Court-martial may be originated at the instance of, and a charge be supported by, an Inferior against his Superior Officer; but the consequences resulting from an acquittal, in either case, are very widely different. The Inferior arrested and arraigned at the instance of a Superior Officer, and acquitted by a Court-martial,[2] has no legal remedy for his arrest or arraignment—because both were Official Acts within the scope of the Superior Officer's duty.[3] When, however, the charge of the Inferior against his Superior

[1] As to same thing in America in 1775, see par. 25, *post.*

[2] Sutton *v.* Johnstone, *ut supra.*

[3] Vol. I. p. 172.

fails, the accusation clearly becomes a crime of insubordination, for which an adequate punishment must be immediately awarded against the accuser.

8. What may possibly be called an exception to this rule of inequality arises when, to quell frays or disorders amongst Officers or Soldiers, authority is given to *all* Officers alike to order offending ones into prison or arrest. This power originated [1] in the 36th Article of War, 1672, was continued in the 20th Article of 1717, and is found as the the 15th Article of 1872, in these words, "All Officers, of what condition soever, have power to quell all quarrels and disorders, though the persons concerned should be of superior rank or belong to another Corps, and either to order Officers into arrest or Soldiers into confinement, till their proper Superior Officers shall be acquainted therewith,"—the only instance which is noticeable where an Inferior can give authority for the arrest of, or otherwise control, his Superior Officer.

9. Neither does the rule (before adverted to) apply to those cases in which the Articles of War provide a method for the redress of grievances, by giving to the Inferior the right of personal complaint for wrongs suffered at the hands of a Superior Officer. It has elsewhere been pointed out [2] that the Articles of 1672 permitted a reasonable complaint of this nature to be urged, and those of 1717 expressly provided the same remedy. The Officer wronged was first to complain to his Colonel,[3] then (if refused redress) to his General, that justice might be done upon his report of the case to the Crown. When the complaint was against the Captain, the Colonel was to summon a Regimental, with an ultimate appeal to a General Court. In either case, if the appeal should appear vexatious or groundless, the appellant was liable to punishment by the General Court, or if the Superior Officer had to make restitution, then he was also to be punished.

10. The Code of 1872, so far as it relates to Soldiers, varies somewhat from that of 1717. The complaint is now confined to matters affecting "pay or clothing," and where made, obliges the

[1] Art. 6 of sec. 10 of the Arts. of 1666 was somewhat similar in terms.
[2] Chap. I. par. 40.
[3] Art. 19.

Colonel to summon a Regimental Court of Inquiry, from which either the Captain or the Soldier may appeal to a General Court-martial, with liberty to be heard by himself and witnesses, though at the risk of incurring such punishment as a Court-martial shall award, should the appeal be pronounced groundless and vexatious. This is the only remaining instance under the Military Code in which a General Court-martial is recognized as one of appeal from the findings of any Inferior Court.[1]

11. This provision, as relating to Officers, came under the notice of Parliament in 1810, when it appeared to be admitted that the Commander-in-Chief (to whom the General's Report should be sent) had a discretion in submitting to, or withholding from, the Sovereign a report of the case.[2] The Article is found in the Code of 1872,[3] and it came under discussion before a Court of Law, probably for the first time, in 1866. The object of this Article is to establish a domestic forum[4] to settle those professional disputes incident to, and which are to be governed by the rules and customs of, the Military Service. If the torts and wrongs "sounding in damages" were to be subjects of legal controversy before the Common Law Courts, great evils would arise; for not only would the position of a Commanding Officer be attended with personal risk (not exaggerated in the judgment pronounced in Sutton and Johnstone),[5] but, what is far worse than this, "the spirit of party—the bane of all armies"—would arise, and then, to use the words of the great Duke, "we should be in a bad way indeed."[6] The essential purpose of the Military Code is to prohibit all personal and acrimonious controversy.[7]

12. Sufficient has been written to show that there was no difference of principle, and little of practice, in the administration of justice by Court-martial before and after the Mutiny Act of 1689. Legislative Authority gave those Courts legal Jurisdiction over the persons and for the offences mentioned in the Code. Contrasting the Articles of War made at the two periods, they

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[1] Compare sec. 16 of Mutiny Act, 6 Vict. c. 3, and 7 Vict. c. 9, and Chap. IX.
[2] Captain Foskett's Case, 16 H. D. (O.S.), p. 746. [3] Art. 12.
[4] Timms *v.* Williams, 3 Q. B. Rep., p. 422; Dawkins *v.* Rokeby, 4 Fos. and Fin., p. 833; Chap. I. par. 30, *ante*. [5] 1 Te. Rep.
[6] Gur. Desp., Vol. iii., pp. 620 and 671, Vol. iv., p. 180. [7] Vol. ii., p. 346.

are in substance the same; but one characteristic—which is worthy of being specially noted—has been preserved in every Code, viz., the allegiance enjoined upon the Soldier towards the Supreme Being.[1] The primary duty traced in all the Codes, from A.D. 1639 to A.D. 1872, was, and is, that of "Divine Worship;" and though, in the year 1847, this section was transposed to another part, yet the words of the Code remain nearly the same. In the earlier Treatises upon the Art of War, those authors thought it not unimportant to press this subject home to the attention of the Soldier; nor in later times have great Captains been silent upon it. When engaged in the struggle of the Peninsula, the Duke of Wellington wrote, "I am very anxious upon this subject, not only from the desire, which every man must have, that so many persons as there are in this Army should have the advantage of religious instruction, but from a knowledge that it is the greatest support and aid to Military discipline and order;"[2] and those readers who may be familiar with the writings of the late Sir Charles Napier will recall his testimony to the same purport.[3]

13. The Military Code continued for many years without material alterations, other than those which have been already mentioned in 1717. Many of the severer enactments were then withdrawn from the Act and placed in the Articles, the disciplinary Sections of which (so amended) are given in the Appendix (A), and the Articles of War, laid upon the table, will be found printed at length in the Journals of the House of Commons.[4] This year, therefore, will furnish a starting-point from which to review the Military Law in the practical portion of this Work. But, before concluding the Chapter, it may be for the convenience of those who have occasion to refer to the Act or Articles in the period intervening between that and the present date, that I should note in outline the several changes that have been—and the years in which they were—made.

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[1] Extract from Articles of 1639:—"No enterprise shall be taken in hand, but the Company that are to execute the same shall first commend themselves to God and pray to Him to grant them good successe."—Vol. I. p. 421.

[2] Vol. iv., p. 584, February, 1811.

[3] Life, Vol. ii., p. 458.

[4] Vol. xviii., p. 910.

14. Until the year 1828 the Mutiny Act underwent very little organic change. In the year 1717 it numbered 53, but in the year 1828 163 Sections. The order in which the Act was originally framed was but little altered, and the Sections that were from year to year added, related rather to Army Administration than to Discipline.

15. The Articles, from 1717 to 1742, so far as I can trace, stood upon the model of those of 1717; but from the latter of these years till 1828, they were (as those of 1672 and 1686) grouped under different Sections, which in 1748 were twenty, and in 1828 twenty-four in number. They stood thus in 1748 as 111 in number:—(1) Divine Worship, 6; (2) Mutiny, 5; (3) Enlisting Soldiers, 2; (4) Musters, 7; (5) Rations, 4; (6) Deserters, 4; (7) Quarrels and sending Challenges, 5; (8) Sutling, 3; (9) Quarters, 5; (10) Carriages, 1; (11) Crimes punishable by Law, 2; (12) Redressing Wrongs, 2; (13) of Stores, 4; (14) Duties in Quarters and in Field, 26; (15) Administration of Justice, 25; Entry of Commissions, 1; (17) Half-pay Officers, 2; (18) Effects of the Dead, 2; (19) Artillery, 2; (20) Relating to the foregoing Articles, 3; the concluding being the Devil's Article—which is not to be found in the Articles of 1717–42.

16. In 1828 they stood as 135 in number, thus:—The Sections 1 to 14 as before set out, except that Section (4) had only 5 Articles, (6) was increased to 7, (8) to 5, (13) to 6, and (14) was reduced to 22 Articles. From [15] to [24] Sections the order stood thus:—[15] Rank,[1] added in 1784 and 1794 as 7 Articles; [16] Administration of Justice, 30; [17[2]] Accounts, added in 1784 as 3 Articles; [18] Entry of Commissions and Leaves of Absence, as 1 Article; [19] Effects of Dead and Deserters, as 4 Articles; [20] Artillery, as 3 Articles; [21] American or Colonial Troops, first added in 1755 as to American Troops, 2 Articles; [22] Troops in the East Indies, added in 1785 as 2 Articles; [23] Troops on board ship, added in 1795, as 1 Article [24] As to the foregoing, as 5 Articles.

17. In the year 1829 the Military Code underwent entire revision, the Mutiny Act being remodelled and reduced to 78

[1] Articles as to Militia and Yeomanry added in 1798.

[2] The Section relating to Half-pay Officers was omitted in 1750; Vol. I. p. 178.

Sections, while the Articles were re-cast and thrown into 7 Sections only, as—(1) Public Worship, 6; (2) Crimes and Punishments, 7 to 67; (3) Courts-martial, 68 to 93; (4) Miscellaneous Duties and Obligations, 94 to 112; (5) Returns and Accounts, 113 to 129; (7) Application of the Articles, 130 to 135, the total number of the Articles. In 1830 the place of some few Articles was changed and 9 others added,[1] relating to malingering and self-mutilation and disgraceful conduct.

18. In 1847 the Military Code was again revised, and the Act increased as from 83 Sections in 1846, to 103 Sections in 1847,[2] In 1848 the provisions relating to Limited Enlistment were added, and the Articles of 1847 were re-arranged, and the Sections increased in number thus:—(1) Duties and Obligations, 1 to 34; (2) Crimes and Punishments, 35 to 108; (3) Courts-martial, 109 to 146; (4) Rank, 147 to 153; (5) Application of the Articles, 154 to 159.

19. The Code continued in this shape until the year 1860, when it was again re-cast, the substance of it being the same. The Act was reduced from 105 Sections in 1859 [3] to 97 in 1860, and the Articles—the same Sections being preserved—were increased from 161 in 1859, to 195 in 1860. But the shifting of Sections and Clauses was such as to puzzle the readers of the earlier and later Codes.

20. The Code of 1872, in regard to the Disciplinary Clauses thereof, is printed in the Appendix. At the foot of each Section of the Act and Articles there will be found such detailed information as the reader may possibly desire for reference. As each Military Student is desired to make himself familiar with the contents of the Act and Articles [4] "so far as it is necessary for the performance of the duties of members of a Court-martial," these extracts are limited to that object. The form of Court-martial proceedings is also given, with that Section of the Queen's Regulations which prescribes the mode in which these shall be conducted.

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[1] These were 39 to 43, 50 and 51, 87 and 88.

[2] Compare 9 Vict. c. 11 with 10 Vict. c. 12.

[3] Compare 22 Vict. c. 4 with 23 Vict. c. 9.

[4] War Office Circulars of 1st April and 28th May, 1872, for Reserve Forces.

21. It appeared to me to be better to complete in outline the history of the Military Code as applicable to our Regular Army before referring, as I now propose to do, to the general adoption of that Code for the Discipline and Government of other Forces; as (1) The Royal Marines, (2) The East Indian, and (3) The American Armies.

22. I. The Marine Regiments were originally raised (as elsewhere shown[1]) in 1694, and governed when on board ship under the Navy Discipline Acts,[2] and when on land under the Army Mutiny Act. This continued until the year 1756, when the Marine Regiments were reorganized under the Command of the Lords of the Admiralty, who, by Commission from the Crown, exercise over the Marines the same powers as are directly exercised over the Army by the Crown. To meet this peculiarity, a separate Marine Mutiny Act (originally framed on the model of the Army Act) and Articles of War (similar to those for the Army) have been annually passed by Parliament and issued by the Lords of the Admiralty. This Code comes into operation by order of the Senior Naval Officer whenever the Marines leave Her Majesty's Ships to join the Army upon a joint expedition on land.[3]

23. All that has been written with reference to the Military Code up to 1756, is therefore applicable by express terms to the Royal Marines; and as their Code has always been from that period substantially the same—as it now is—with the Army Code, little qualification to the text is needed. When asked to explain to the Royal Commissioners on Courts-martial how the Marine differed from the Army Act, the Adjutant General of the Marines[4] said "it was assimilated to the Army Act in every possible way: as regards the punishment of offences and Military economy generally, it was very nearly similar to the Army Act, and from year to year the alterations of the 'Army' were adopted into the 'Marine' Act." In the year 1871, to make the assimilation of discipline more complete, the Marine Articles of War[5] made

[1] Vol. I. pp. 75, 264-265, 398. [2] 13 Car. II. c. 29, and 22 Geo. II. c. 33.
[3] Report of Court-martial Commissioners, 1868, Question 3885.
[4] Evidence of Col. Lowder, C.B., Question 3881. [5] Sect. vi. Art. 157.

the "Queen's Regulations for the Army" binding on the Royal Marines when serving on shore in England, and at all other times and places when under the Mutiny Act, in matters connected with Discipline, Drill, and exterior economy generally, and in all questions arising when serving in garrison or quarters with the Army, "except where special Regulations have or may be issued by the Admiralty," or "where the form of procedure laid down in the "Queen's Regulations for the Army" is not applicable to the Royal Marines."

24. II. The Indian European Army formerly of the Company,[1] but now of the Crown, was from 1754 to 1863 governed by a separate Indian Mutiny Act, framed on the model of the Army Act.[2] In the latter year the Indian Act was repealed,[3] and the Army in India was made subject to the Army Mutiny Act (26 Vic., c. 8), several sections (now sections 99, 100, and 101, of 1872) being transferred from the Indian to the Army Act. The Indian Native Army of the Crown is not governed by the Army Mutiny Act, but by Articles of War enacted by the Legislative Council of India; those of 1861 and 1863 being the Code which is at present in force.

25. III. The American—though now unfortunately in legal parlance an alien—Army is governed by a Military Code "mainly derived" (as we are informed by a competent authority) from the English Code.[4] We have already seen how, in our domestic troubles of the 17th century, the opposing Armies of the King and of the Parliament were governed under the same Military Code:—how, in fact, the Articles of War put forth by the Earl of Northumberland in 1640 were adopted, in substance always and in words often, by Lord Essex in 1642.[5] So, in 1775, the same thing happened in America. At that time the "Ministerial" Army, as our then fellow-subjects called Gage's and Burgoyne's force, was governed by our Mutiny Act and

[1] As to this, see Vol. I. pp. 268-270; Vol. II. p. 435; and Chap. VII. par. 26, *post*.

[2] The first and last were 27 Geo. II. c. 9, and 20 & 21 Vic. c. 66. The Indian Officers holding Brevet Rank from the Crown were liable to both Codes in 1823. India Office Record (666). [3] 26 & 27 Vic. c. 48. [4] Benét, p. 20.

[5] Chap. II. par. 19, note, and par. 7, *ante*.

Articles of War. When the "Continental Congress" raised an Army in defence of the liberty of America, that Assembly could find no Military Code better suited to their requirements than the then current Articles of War by which this Ministerial Army was governed, and accordingly, on the 30th of June in that year, they put forth Articles of War (sixty-nine in number) for the government of their Army, which were framed ("with the Devil's Article"[1]) on the model of the English, but with this marked difference—that by the American Code death was only three times named as a punishment—viz., as for the breach of Articles, which were 25, 26, and 31, in theirs, and are 52 and 54 in our Code of 1872.[2]

26. The present American (which is so similar to our own Military) Code, was enacted by Congress on the 10th of April, 1806; and, in illustration of it, the able writers upon Military Law in that country have not failed to draw largely from Works that have been here put forth upon our Mutiny Act and Articles of War. The advantageous custom which prevails in America of making public the opinions[3] of their highest Law Officer—the Attorney-General—upon State documents has furnished me with additional materials for this Work; for, where (as not unfrequently is the case) the words or principles of the two Codes are the same, I have not failed to give my readers the advantage of knowing what, by competent authority, in America has been ruled to be the Law or Practice of Courts-martial Jurisdiction.

[1] Art. 49.

[2] See them printed verbatim, Vol. ii. American Archives (4th Series) p. 1856. In April (1775) the State of Massachusetts put forth fifty-three Articles of War, printed Vol. i. ib., p. 1350.

[3] These are published in 12 vols. 8vo.

CHAPTER V.

THE INITIATION OF LEGAL PROCEEDINGS BY THE ARREST OF THE OFFENDER.

1. FROM what has been written, the reader may be prepared to enter upon the consideration of the practical application of Military Law to correct the offences against discipline committed by the Officers and Soldiers of the Army. Some outline of the Military system has been already given, but such detail must here be added as will render this Chapter one of practical utility; and as no reader can be supposed to be ignorant that every member of the civil community is amenable to the Criminal Law through the established agencies of the Civil Police and Legal Tribunals, so it will be my first purpose to explain through what Military agency and by what Military Tribunal every offender against the laws of the Army is brought to Justice.

2. The discipline, as incident to the Command, of the Army is vested in the Sovereign. Unity is the very essence of Military Command; and therefore all authority—passing though it may do through many subordinate channels—is derived from only one source, viz., the Crown. The primary agent in whom all disciplinary powers are vested is the General appointed to the Chief Command, whose authority is paramount over the Army. In the ordinary discharge of this duty, his orders would be conveyed to Generals in subordination to him; but in theory his authority permeates throughout the Army, and can be either directly or indirectly exercised to relieve him from, or stimulate him to, the discharge of professional responsibility. The transcendent nature of his power over the Army cannot perhaps be

better expressed than by using as an illustration of it the legal maxim, "In præsentia majoris cessat potentia minoris."

3. In all matters of discipline the executive Officer of the Commander-in-Chief is the Adjutant-General, who, to borrow a phraseology familiar to legal minds, it is no exaggeration to say, is the "hand and mouth"[1] of the General. All controversies or offences, involving the interference of the Commander-in-Chief, are submitted through him for decision. Her Majesty's Regulations for the general observance of the Army are issued under his imprimatur. The ultimate appeal, whether an offending Officer shall be brought to trial or released from arrest, is determined upon his advice.

4. The Consultative Officer of the Commander-in-Chief and his legal adviser is the Judge Advocate General. The history of this office has been given elsewhere; and the practical duties of it, in relation to the trial of the Prisoner, will be shown hereafter (Chapter VI.).

His functions, as originally designed by his Patent, the Royal Warrant[2] of 18th February, 1694-5, and indeed as now exercised (upon each General Court-martial initiated in the United Kingdom, and conducted under his deputation), are rather those of a legal adviser—if he tenders his advice—than of a Judge. Besides which, all questions preceding any trial by Court-martial—as the form of the charge, the nature of the evidence, and other incidents needing direction—come up to

[1] "The seal," said Chief Justice Tindal, "is the hand and mouth of a Corporation." Gibson *v.* E. I. Co., 5 Bing. N. C., p. 269.

[2] William III.'s Warrant of the 18th February, 1694-5,* was addressed to a Board of General Officers (of whom three were to be a quorum) for the redress of grievances in the Army. They were to sit twice a week, or oftener, "at the Great Chamber in our Horse Guards at Whitehall," that complaints might be made. They were also to inquire into the behaviour of the Officers and Soldiers in reference to their payments or any other matters, and to refer such cases to Court-martial as they saw fit, and to report extraordinary cases to the King.

The Board was then required to consider of and make such "Rules and Regulations for the better government of our Forces" as should seem meet for the King's approbation. The concluding paragraph is in these words: "And our Judge Advocate of our forces or his deputy is at all times to give his attendance at such meetings, and to receive and observe the directions of our said officers as the duty of his place may require."†

* See also Warrant of 1689, referred to in Chapter III., *ante*. † P. 126 of C. M. Bk. (114).

him from General Officers desirous of his advice; for, in the interests of discipline, it is essential that in the legal tournament to uphold it, the authority of the Superior should not be overthrown by the Inferior Officer, at least not by error in law or in procedure against which any ordinary forethought can guard.[1]

5. As the responsibility for discipline could not be fulfilled without a distribution of labour, the area of the United Kingdom (taken as an illustration) is parcelled out and divided into so many separate Military Districts or Commands, presided over by a General Officer in each, and having upon his Staff an Assistant Adjutant-General as a Disciplinary Officer.[2] In subordination to the Commander-in-Chief, he holds the same authority over that part of the Army in his District as the Commander-in-Chief holds over the whole of the Army in the United Kingdom; his authority within this District being supreme.

6. These territorial arrangements do not, however, interfere with the regimental system which exists wherever a Regiment may be quartered. Over this Administrative Unit—but in subordination to the District General—the Lieut.-Colonel (or in his absence the Major) holds the supreme command, aided by an Adjutant. His standing orders for the Regiment are to be obeyed; and, to secure obedience, each separate Company is commanded in subordination to the Colonel by a Captain (or by a Lieutenant in the absence of the Captain), whose orders the Company are bound to obey.[3]

7. The rule is no doubt that the men should be led by their own Officers, and hence the etiquette of the Service is that the orders of the Superior Officer should be given to and carried out by the agency of all the Officers subordinate to him, according

[1] It was suggested, by witnesses before the Court-martial Commissioners in 1869, that the Judge Advocate General should be released from this responsibility, and that in lieu thereof he should have power to quash the proceedings and annul the Finding or Sentence of a Court-martial for irregularity. These incidents occurred after the Mhow Court-martial, in 1863, for the benefit of Paymaster Smales, followed by Col. Crawley's trial and honourable acquittal—these experiments should not be repeated. [2] But no Judge Advocate.

[3] As to the personal execution of orders by a Superior or their delegation to an Inferior, see vol. vii. Gur. Desp., p. 232.

to their respective duties; but the power of the Superior Officer, where present, is always supreme.[1] It must therefore be understood that each of these several Commanding Officers is absolute and supreme only in the absence of his Superior, but that his orders (not, of course, being inconsistent with those of his Superiors) are to be implicitly obeyed. Where the Captain reports to the Colonel, or the Colonel to the General, or the General to the Commander-in-Chief, or the Commander-in-Chief to the Responsible Minister of the Crown, the order or act of the subordinate Officer approved or adopted by—becomes in fact the order or act of—the Superior Officer (the chain of subordination and of responsibility being preserved throughout the Army) or of the State.[2]

8. It must be noticed, as will be seen hereafter, that each of these Military Hierarchs or Magistrates, above the rank of Captain, has jurisdiction given him by the Mutiny Act and the Warrant of the Crown, to establish a Court for the Punishment of Military Crime committed by those under his Command. Thus, for the ordinary crimes of the Soldier, committed against the discipline of his Regiment, the Colonel (as responsible for it) can summon his "Regimental"[3] Court. For graver offences—committed in the District, and beyond the authority of the Colonel—the General can summon his "District" Court; and for the highest military crimes—which are to be brought under the cognizance of the Commander-in-Chief—the "General" Court is summoned by his authority.

As in the Civil Administration of Justice, Courts of Petty Sessions for small offences; of Quarter Sessions for graver ones; and of Oyer and Terminer for crimes, have been established,

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[1] "It must be understood," wrote the Duke of Wellington, "that the position of rank is attended by the necessity for the performance of duty, and for attention to the maintenance of good order and discipline. It is not in the power of an Officer to lay aside or assume his rank in the Service at his pleasure, but most particularly not when he is on a parade upon which troops are formed for duty."—G. O. of 17 Sept. 1813, Vol. VII. Gur. Desp., p. 7.

[2] See the subject discussed in Vol. II. p. 148.

[3] When parts of Regiments are "detached," a "Detachment," with the same powers as a "Regimental," Court is summoned. See Chap. II., par. 26, and Art. 113 of 1872.

with separate and defined authority: so it is in the Military Administration of Justice, in regard to the several Courts-martial, as Regimental, District or General, which are held under the Mutiny Act.

9. These Courts are not, however, permanent, but created "*pro hac vice*," *i. e.* for the trial of the particular offender; but continuing until their adjudication upon his case has been finally disposed of by the Military Hierarch convening the Court. The Officers summoned to attend as Judges, do so as part of their Military duty; and for absence or neglect, they are liable to be punished themselves by a General Court.[1]

10. The General Court, which until the 3rd Geo. I., c. 2,[2] the General could summon without authority from the Crown, is now constituted by Royal Warrant granted under the countersign of a Secretary of State, and the authority of the 6th Section of the Mutiny Act. An annual delegation is given to the Commander-in-Chief and other General Officers, which empowers the Officer holding the Warrant to assemble from time to time in the United Kingdom, as occasion may require, General Courts for the trial of any *Officer or* Soldier under his Command, charged with any offence against the rules of Military Discipline, and committed either before or after he undertook the Command. The Warrant further directs that the Court is to be constituted, and to proceed in the trial of such charges, and in giving Sentence and awarding Punishment, according to the rules prescribed in the Act and Articles; and then orders that the Proceedings of each Court shall be sent to the Judge Advocate General, that he may lay the same before the Sovereign, and afterwards send them to the Commander-in-Chief for the decision of the Sovereign thereon.[3]

11. The "District" Court, which was first authorized by the Mutiny Act of 1829, is constituted under a like authority. The Warrant authorises the General of the District to assemble "District" Courts for the trial and punishment of any *Soldier* belonging to the forces under his Command, who is charged with Mutiny or Desertion, or with any offences mentioned in

[1] See Appendix D. [2] Compare with 1 Geo. I. s. 2, c. 34.

[3] The Warrant to General Officers abroad gives plenary powers, and a power of delegation to other Officers.

the Act and Articles, as liable to be tried by such Courts, or with any other misdemeanour or misbehaviour contrary to the rules of Military Discipline. Here again, the Warrant directs that the Court is to be constituted, and to proceed in the trial of offenders, and in giving sentence—and awarding punishment (not extending to death or penal servitude), according to the powers and directions contained in the Act and Articles. The proceedings go, as of course, to the "District" General, and the Warrant authorizes him (or in his absence, the Officer in acting Command) to confirm and put the Sentence in execution, or to suspend, mitigate, or remit such Sentence, as shall be best for the good of the Service.

12. The "Regimental Court"[1] has always been convened by the Colonel under directions conferred by the Articles of War first in 1672, and now continued, in 1872,[2] without any special Warrant. The Commissioned Officers, on the appointment of their Colonel, or Commanding Officer, may hold "Regimental" Courts, and may inquire into such disputes and criminal matters as may come before them; but no Sentence shall be executed[3] until the Commanding Officer of the Regiment shall have confirmed the same.

13. Other Courts may be formed: one (first sanctioned in 1813), as the "Detachment General",[4] to be held under Section 12, to punish offences committed against the inhabitants, in a Foreign Country; and the other (first sanctioned in 1830) as the "Drum Head,"[5] to be held under Section 11, to punish on the spot, mutiny or insubordination committed on the line of march. These are exceptional proceedings which are within the competency of commanding Officers to adopt upon emergencies, but they are not Courts which need be here further adverted to.

14. These three—"General," "District," and "Regimental"—Courts are those under which the Army is governed, and by which the Military Law is administered. The details relating to each Court—as the number of Officers of which it should be composed, the offences which it can try, and the punishments which it can inflict—will be found set out in the Military Code of 1872, printed in the Appendix. These Courts, as divided

[1] Art. 59. [2] Art. 112. [3] Art. 129.
[4] Chap. III., par. 26, and Chap. VIII. par. 11. [5] Chap. VIII., par. 12.

into "General and District," on the one hand, and "Regimental" on the other, have to some extent a difference in their mode of procedure, which will be more properly explained in the next Chapter; but in this, as preliminary thereto, it will be necessary to advert to the initiation of legal proceedings for Military Offences, and to ascertain who are the persons subject to arrest under the Military Code.

15. Who of Her Majesty's subjects are amenable to the command or lawful orders of General Officers, and to the Jurisdiction of these Military Tribunals, is a question to be determined under two conditions: 1st. That of Statutory Enactment; and, 2nd. That of Appointment by the Crown. These conditions being fulfilled, the liability to Military Law is complete. There are two methods by which this Statutory liability may be imposed; for instance, should it be thought expedient, by the Mutiny Act, to relegate the duties of the Treasury to the Commander-in-Chief and Officers of his department, this might be done—either by a specific designation of one supreme official—as the First Lord of the Treasury—or by a generic term, as "all persons serving in the Treasury Department." In the one case, Parliament would have limited the application of the Act to one official—or, in the other, to one class of officials—but leaving the appointments of those officials in the hands of the Crown. However, in either case, the obligation under the Act, to obey the orders of the Commander-in-Chief or General Officers, would be complete. Now, on referring to the 2nd Section, it will be seen, that this liability is often imposed by the use of generic terms, as "persons commissioned," or in "pay" as "Officers" or "Soldiers," or "Officers or persons serving in the Control Department." It is clear, therefore, that Parliament has confided to the Crown the responsibility of selecting those officials, who in regard to their duties, whether Civil, Financial, or Military, should be placed under the Military Code.

16. The primary test of this liability is Statutory enactment; and then holding such an appointment from the Crown as to bring the holder within the designation, or class[1] of persons

[1] Grant *v.* Gould, *sup.*

made liable to the Act. However, for many years (from 1744 to 1828) the Articles of War[1] declared all "Sutlers and Retainers to a camp to be subjected to the rules and discipline of War," though it was clear from the Law Officers' Report in 1744-5 that they could not be punished by Court-martial, because they were neither designated in the Act nor were they Officers or Soldiers. Had the Crown seen fit to commission or enlist—or even to pay them "as Officers or Soldiers"—this liability would then have attached[2] to them.

17. The expression of Lord Campbell's opinion, as given in Wolton *v.* Gavin, had reference to this express Statutory liability, and should be received with some caution. No doubt the original intent of Parliament was to limit the operation of the Military Code to the Combatant part of the Army; and for many years the Act was so worded as to include only Officers and Soldiers, viz., that class who, according to Mr. Windham's definition, "live in bodies by themselves—not fixed to any spot, nor bound to any settled employment—who neither toil nor spin, whose home is their regiment, and whose sole duty is to encounter and destroy the enemies of their country," but it can scarcely be truly asserted that this is so now. "I am most anxious as a Constitutional Judge," Lord Campbell declared, "that it should be fully understood to be my opinion that none are bound by the Mutiny Act except Her Majesty's Forces."[3]

18. Hitherto—that is, prior to April, 1872—the Auxiliary or Reserve Forces have not been under the command of General Officers of the Army; except at certain periods of service specified in the Statute Law; but as, in this respect, a great change has been made, which, if not properly understood, may lead to some confusion, I propose to show (now that these Forces are withdrawn from the command of the Lord-Lieutenant) how and to what extent they are—

1st. Under the command of General Officers of the Army, and as such—

2nd. Amenable to the Mutiny Act, and Courts-martial awarding punishments for Military Offences—

[1] Sec. 14, Art. 23 of 1749, and Sec. 24, Art. 3 of 1828.

[2] Grant *v.* Gould, *sup.* [3] Vol. II. p. 37.

Premising that as Discipline is the incident of Command, it must be administered upon a uniform system: as the Regular and Auxiliary Forces are now placed under *one* Ruler, the standard of Law and of obedience, whether higher or lower *before*, must be the same *after* their amalgamation.

19. This liability to the Military Code is to be found in the one or more Acts of Parliament, under which each Force has been raised, subject, however, to one or two general enactments relating to all the Auxiliary Forces—which must first be set out.

1st. Under the Army Regulation Act,[1] 1871, the command of the Militia, Yeomanry and Volunteer Forces in each county has passed from the hands of the Lord-Lieutenant [2] to those of the Crown, being exercised by the Secretary of State. The Act also enabled the Crown to delegate such Command to any Military Officers, and declared that the Commissions held by Officers of Militia, Yeomanry and Volunteers should be deemed to have been issued in the same manner as that in which Commissions in the Regular Army are issued.

20. 2nd. By the first Mutiny Act it was enacted, "That this Act or anything therein contained shall not extend or be anyways construed to extend to or concern any the Militia Forces of this Kingdom;" and these words—extended to the Yeomanry and Volunteer, and the Reserve Forces of 1867—stand in the present Mutiny Act with this addition:[3] "Excepting only [*as hereinafter enacted, or*][4] where by any Act for regulating any of the said Forces the provisions contained in the Mutiny Act are, or shall be, specially made applicable to such Forces."

The effect of these statutes, therefore, is not to enable the Crown to govern these Forces as part of the Army solely under the Military Code, but only so to govern them as the several Statutes under which they were raised and formed will warrant such Government.

21. I. As to the Militia.

It must be borne in mind in reference to the question now

[1] Sec. 6. [2] As to this Officer, Vol. I. pp. 32, 281; Vol. II. p. 127.
[3] 1 William and Mary, c. 520, and Sec. 5 of 1872, in which the words italicized were first inserted. [4] These words [ ] were first inserted in 1872.

under consideration that under the authority of 32 Vic. c. 13, and the Army Regulation Act,[1] 1871, Her Majesty has been "pleased to place the several Regiments and Corps of Militia, for the period of their assembly, training or exercise, and the Permanent Staff of such corps at all times, under the Command of the Officer Commanding in Chief and of the General Officers of the Regular Forces Commanding in the Districts within which such Militia Regiments or Corps are assembled, trained, or exercised respectively, and where such Permanent Staff are stationed."

22. Now turning to the Militia Acts, the following provisions are found there:—

(1.) "During the *period of training and exercise,* all the clauses, provisions, matters, and things contained in the Mutiny Act and Articles of War shall be in force with respect to such Militia in all cases whatsoever, but so that no punishment shall extend to life or limb."[2]

23. The Militia, during embodiment, become in fact Regiments of the Line—amenable to the Mutiny Act as Soldiers—except that no punishment must extend to life or limb, and no service exacted beyond the area of the United Kingdom or the Channel Islands. As to interior Discipline, and Regimental Economy, they are governed by the Queen's Regulations.[3] The liability to the Mutiny Act is thus imposed:—

(2.) During the time that the Militia is "*drawn out and embodied,* until the same shall be returned again to its own county and disembodied by Her Majesty's order, it shall be subject to all the provisions contained in the Mutiny Act and Articles of War, and all the provisions contained therein shall be in force with respect to the Militia while embodied, as aforesaid, in all cases whatsoever."[4]

24. This liability is limited by the terms of the Act to two periods: 1st, that of training and exercise; and 2nd, that of embodiment and return home. After these periods have expired, the power of Military Law over these Officers and Men ceases, unless it can be supported under one or other of

[1] W. O. Circular, 28th May, 1872, Auxiliary and Reserve Forces.
[2] 42 Geo. III., c. 90, sec. 89. [3] Dickson *v.* Combermere, 3 Fos. and Fin., p. 543.
[4] 2 Geo. III., c. 90, sec. 111; Reg. *v.* Jessop, 1 Den. C. C., p. 619.

two subsequent Statutes. The first of these—the 55 Geo. III. c. 168—enables a General or Regimental Court[1] (consisting of Militia[2] Officers) to try offences committed during either of the two periods if the charges are delivered and made out within six months after the training or disembodiment; and the second —56 Geo. III. c. 64, sec. 5—enables Deserters to be punished at any time, though no such charges have been delivered.

25. (3.) During the time that any Militia volunteer is "attached for a time for the purpose of instruction to any Regiment of Her Majesty's Forces or Permanent Staff of Militia, he shall for such time be deemed to be under the operation of the Mutiny Act, and under the command of the Officer commanding such Regiment or Permanent Staff of Militia."[3]

(4.) The Permanent Staff of the Militia "shall be at all times subject to the Mutiny Act and Articles of War," and it shall be lawful for the Colonel of the Regiment to direct the holding of Courts-martial for the trial of offenders for any offence against the said Act and Articles committed during the time such Regiment shall not be embodied, and for the trial of any one who shall have deserted while the Regiment was embodied, and shall not have been apprehended till after it shall have been disembodied, but so that no punishment should extend to life or limb.[4]

(5.) The provisions of the 55 Geo. III. c. 168, were in the following year[5] made applicable to the Permanent Staff of the Militia for all offences committed against the Mutiny Act, so that General and Regimental[6] Courts may be summoned under the 55 Geo. III. c. 168, for the punishment of these Officers and Men at any time.

26. II. As to the Yeomanry.

It must here also be borne in mind that under the Act[7] of 1871 Her Majesty has further been pleased "to place the

[1] An Opinion has been recently given that District Courts have authority over these Forces.

[2] As to this, Mr. Justice Story's Judgment in Martin *v.* Mott, 12 Wheat. Rep., p. 35, and Maltby on Courts-martial, p. 57. [3] 17 & 18 Vict., c. 105, sec. 53.

[4] 42 Geo. III., c. 90, sec. 103; 17 & 18 Vic., c. 105, sec. 33. See also 22 & 23 Vic., c. 38, sec. 12; 23 & 24 Vic., c. 94, sec. 15.

[5] 56 Geo. III. c. 64. [6] It is said "District" also. [7] W. O. Circular, *sup.*

several Regiments and Corps of Yeomanry Cavalry when assembled, marched, or doing voluntary military duty, and the Permanent Staff of such Corps at all times, under the command of the Officer Commanding in Chief and of the General Officers of the Regular Forces Commanding in the Districts in which such Regiments and Corps are respectively assembled, marched, or doing military duty, and where such Permanent Staff are stationed."

27. Turning to the Statute which regulates this Force it enacts:

(1.) That force from the time of the summons of the "Lord-Lieutenant to assemble and until the enemy shall be defeated, &c. (the same to be signified by Her Majesty's Proclamation) shall continue, and be subject to all provisions in the Mutiny Act and Articles of War in all cases whatever."[1]

(2.) So again when they assemble (such assembling not being under the 46th section of the Act) "to do military duty, or for improving themselves in military exercise, or "for the suppression of riots," such Yeomanry from the time of so assembling and during the period of their remaining on such military duty, or being engaged in such service as aforesaid, shall be subject to all the provisions of the Mutiny Act and Articles of War.[2]

(3.) The Permanent Staff of the Yeomanry "shall at all times be subject to the Mutiny Act and Articles of War, and shall be liable to be tried for any crime committed against such Act and Articles" by any Court-martial, according to the nature and degree of the offence, in like manner and under the like regulations as the Permanent Staff of the Military Forces, provided the Court-martial is composed of Yeomanry Officers, and that no punishment awarded extend to life and limb, except when such corps is "called out in case of invasion."[3]

28. III. As to the Volunteers.

Here, again, under the Act of 1871,[4] Her Majesty has, moreover, been pleased "to place all Volunteers, when assembled for

[1] 44 Geo. III., c. 54, sec. 22. [2] Ib., sec. 23. [3] Ib., sec. 21.
[4] W. O. Circular, *sup.*

drill or inspection or voluntarily doing any other Military duty under the command of the Officer Commanding in Chief and of the General Officers of the Regular Forces Commanding in the districts within which such Volunteers are undergoing inspection, or doing Military duty. And to declare that the Permanent Staff of all Administrative Regiments and Corps will be at all times under such Military Command."

29. The Volunteer Act, 1863, contains these enactments:—

(1.) All the Officers and Men (including the Permanent Staff) when in actual Military service are liable to all the provisions of the Mutiny Act (and also entitled to the benefits thereof) in all respects as the Officers and Soldiers of Her Majesty's Army, except that the Court-martial shall be composed of Officers of the Volunteer Force only.[1]

(2.) The Permanent Staff of the Volunteer Force when *not* on actual service, are subject to all the provisions of the Mutiny Act (and to the benefits thereof), subject to the variations and provisions which the 22nd Article of the Volunteer Act specifies.

(3.) The Act of 1871 also extended the Mutiny Act and Articles of War to the Volunteer Force without any limitation as to Punishment, thus:—"That where any part of the Volunteer Force is assembled for the purpose of being trained with the Militia, or Regular Forces, the Mutiny Act and Articles of War shall apply to the part of the Volunteer Force so assembled in the same manner as they apply in pursuance of the Volunteer Act, 1863, to Volunteers on Actual Service."

30. IV. As to the Reserve Forces.

Under the Act of 1871,[2] Her Majesty was further "pleased to direct that the Army Reserve (including the Enrolled Pensioners) shall be placed under the Command of the Officer Commanding in Chief and of the General Officers of the Regular Forces commanding in the Districts within which they are assembled for training or exercise."

31. The Reserve Force Act, 1867, enacts:—Whenever the Reserve Force, or any part thereof, is called out for training

[1] 26 & 27 Vic., c. 65, sec. 23. [2] War Office Circular, *sup.*

and exercise, or when any of such Force, having volunteered their services for that purpose, are kept on duty as aforesaid, or when such Force, or any part thereof, is called out in aid of the Civil Power as aforesaid, or is called out on permanent service under Her Majesty's Proclamation, all the provisions of that Act and the Articles of War in force shall apply to and in respect of the said Force, or such part thereof as may be or ought to be on duty on any of the occasions aforesaid, and the Officers and Non-commissioned Officers appointed to command them, as fully as such Act and Articles may be applicable to and in respect of Her Majesty's Regular Forces; and offences committed by such Officers and Non-commissioned Officers, and the Men of such Force, as may be or ought to be on duty on any of the occasions aforesaid, may be inquired of and tried by Court-martial assembled under the provisions of any such Act, according to the usual discipline of Her Majesty's Army; and Courts-martial for the trial of any such offences may be holden, and the Punishment awarded by any such Court-martial may be inflicted, either during the time for which such Officers, Non-commissioned Officers, and Men are or ought to be so on duty as aforesaid, or at any time within twelve months after the offence has been committed or the offender has been apprehended.[1]

32. V. As to the Militia Reserve, the Act under which this Force was raised provides:—

"During any time for which any Men enlisted under this Act may have volunteered to be trained and exercised with any part of Her Majesty's Army, and whenever any Men enlisted under this Act are upon Army Service, all the provisions of the Mutiny Act and Articles of War shall apply to such Men, and to all persons whomsoever in respect of them, as fully as such Act and Articles may be applicable to and in respect of Her Majesty's Regular Forces; and offences committed by such Men may be inquired of and tried by Court-martial assembled under the provisions of any such Act, according to the usual discipline of Her Majesty's Army; and Courts-martial for the trial of any

[1] 30 & 31 Vic., c. 110, sec. 12.

such offences may be holden, and the Punishment awarded by any such Court-martial may be inflicted, either during the time for which such Men have volunteered to be trained and exercised, or (as the case may be) are upon Army Service, or at any time within twelve months after the offence has been committed or the offender has been apprehended."[1]

33. With this preliminary explanation with reference to the Auxiliary and Reserve Forces, the general subject of this Chapter may be entered upon. As the power[2] of summary Punishment in time of Peace which the Articles of 1717[3] permitted the Commanding Officer to inflict, has long ceased, the first step towards bringing an offender to Justice under the Military Code is to order his arrest or confinement. As preliminary thereto, the Commanding Officer, before ordering it,

[1] 30 & 31 Vic., c. 111, sec. 11.

[2] The only disciplinary powers of Punishment appear by the Queen's Regulations to be as follow:—

"339. In order to secure uniformity of system, Commanding Officers are authorized to award the undermentioned Punishments only for such offences as are not deemed of a sufficiently serious nature to be brought under the cognizance of a Court-martial, viz.:—

"(*a.*) *Imprisonment or deprivation of pay*, or both, to the extent authorized by the Mutiny Act and Articles of War. The imprisonment, which is to be reckoned from the date of the Commanding Officer's award, is to be carried out in the provost cells in conformity with the Regulations contained in Sec. 15. In the Royal Engineers forfeiture or reduction of the several rates of working pay may be awarded in certain specified cases.

"(*b.*) *Confinement to barracks* for any period not exceeding twenty-eight days, which carries with it punishment drill to the extent of fourteen days, the taking all duties in regular turn, attending parades, and being further liable to be employed in duties of fatigue, at the discretion of the Commanding Officer. Every award of confinement to barracks for fourteen days and under, is to carry with it punishment drill, which in the mounted services is to be 'kit drill,' and in the infantry 'marching order.'

"(*c.*) *Extra guards or picquets*; but these are never to be ordered as a punishment except for minor offences, or irregularity when on, or parading for, these duties.

"351. Punishment drill; which is to consist of marching only, and not of instruction drill, is not to exceed one hour at a time, and under no circumstances is it to exceed four hours altogether in the same day. It is to be carried on in the barrack-yard or drill-ground, and when regiments or detachments are in billets, and have not such accommodation, then defaulters are not to be exposed to ridicule by being drilled in the streets; but they are to be marched out on one of the public roads for the prescribed period, under charge of a Non-commissioned Officer."

[3] Arts. 35 and 40.

should satisfy himself whether the accused is a person who was (1) subject to the Code when the offence was committed and at the time of his arrest; and if so, (2) whether the offence is one for which he can be punished under the Military Code.

34. I. From what has been already written, the reader, perhaps, need not be cautioned against supposing that all those who are resident or commorant within the Camp or Barrack are thereby rendered liable to trial by Court-martial. Such a liability must be found upon the Statute Book in plain and explicit words, leaving nothing to inference. "Any Statute which takes away the right of trial by jury and abridges the liberty of the subject must," said Chief Justice Best, "receive the strictest construction," so that "nothing should be holden to come under its operation that is not expressly within the *letter and* the spirit of the Act." [1]

35. This liability must also be existent: (1) When the offence was committed—for the Mutiny Act has no retrospective operation, and (2) when the offender is arrested—for, as a general rule, his liability to the Military Code, unless prescribed by Statute, ceases with his military engagement for service.[2] If these objections exist, neither of them can, I apprehend, be cured by the offender's consent or acquiescence in the jurisdiction of the Military Tribunal.[3]

36. Whether an Officer or a Soldier "on leave" or furlough continues liable to the Act has not (that I am aware of) been ever authoritatively decided. The question appears to have been discussed in September 1831 at the Board of Admiralty, and a doubt entertained whether an Officer on leave could be tried by a Court-martial for a Military offence. In Lieutenant Poe's case,[4] the misconduct of which a Court-martial had convicted him happened when he was returning home on leave as a passenger on board the 'Cæsar;' but no objection that the sentence was illegal on that ground was taken before the Court

[1] Looker *v.* Halcomb, 4 Bing. Rep., p. 189. [2] Vol. I. p. 186.

[3] See Vol. i. Attorney-General's Opinions, 1820, Wirt, p. 383; Vol. vi. ib. 1853, Cushing, p. 239. Andrews *v.* Elliott, vi. ib., p. 338; Vansittart *v.* Taylor, 4 Ell. and Bl. p. 912; vol. ix. Attorney-General's Opinions, 1858 Black, p. 184.

[4] Vol. I. p. 183.

of King's Bench.[1] An Officer on parole[2], or on half-pay[3] only, cannot be tried by Court-martial.

37. An Officer suspended remains liable to the Mutiny Act; but "Whether an Officer, having been dismissed from His Majesty's service, and having no military employment, is triable by a Court-martial for a Military offence lately committed by him while in actual service and pay as an Officer," was the question submitted to the Judges in Lord George Sackville's case, and their answer (of the 3rd March, 1760)[4] was in the affirmative. It would, however, be scarcely safe to rely on this ruling at the present day. Any one not an Officer or Soldier placed upon his trial by Court-martial at his own request is not thereby made amenable to Military Law; for if the Court have not jurisdiction, it is clear that such cannot be obtained by the Prisoner's consent or agreement to be bound by its Sentence.

38. Foreign troops, unless specially named, are not liable to the Act, and when the Hanoverian troops came to this country under the orders of George II., the Secretary at War was advised that the King had no power over them under the Mutiny Act or Articles of War. As the Commander-in-Chief, the King might order deserters to be sent to their corps, either here or abroad, but he could do no more.[5]

39. Lord Hale lays it down that if an alien[6] enemy comes into the kingdom hostilely to invade it, he shall, if taken, be tried by Martial Law as an enemy, and not by the Common Law Courts as a traitor. This rule appears to have been acted upon by William III.; for the Court-martial Books contain an entry (under date 18th April, 1695) of a Warrant for the formation of a Court-martial for the trial "of Tobias Le Roy, *alias* Boerke, lately come out of France, with a commission from the French King, whose subject he owns himself to be, so that he might be justly deemed to be a spy, and to have treacherous designs against our Person and Government." The Court was

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[1] Sullivan, p. 87. [2] Until exchanged, Maltby, p. 35. [3] Vol. I. p. 178.

[4] Maltby, p. 35, and see Captain Norris's case in 1744, Vol. i. M'Ar., p. 430, and 13 Parl. Hist., p. 1260; Vol. I. p. 182. [5] Vol. I. p. 188.

[6] In Elijah Clark's case the man not being an alien was, though convicted by Court-martial, discharged by the President of the United States as a citizen not liable to Court-martial trial.—Maltby, p. 36.

authorized to try the accused, and, if guilty, to give final judgment for his condemnation and punishment by death, corporal punishment or otherwise, as by the rules and methods of war and the military laws of nations on that behalf ought to be inflicted.[1]

40. And lastly it may be remarked that as no one is entitled to require the Crown to prosecute him in the ordinary courts of the kingdom, neither has an Officer any manner of right to call on the Crown to arrest him, or after arrest to incur the waste of public time and money by assembling a Court-martial for his arraignment on any charge that may free his character from doubt or suspicion. "Every one," said Mr. Villiers (as Judge Advocate General), "might ascertain, by searching the most elementary works upon the military system of this country, that an officer has *no* right *whatever* to a Court-martial as a means of inquiry into his conduct."[2]

41. There are, however, two cases in which offenders ultimately amenable to a Court-martial should not be arrested—except in the one case with the previous intervention of the Civil Power, and in the other by a Naval and not by a Military Officer. The first case is where a deserter is found in the character of a civilian. Hitherto the policy of the law has been to preserve the Civil *status* of the subject until changed under the attestation[3] or adjudication[4] of the Civil Magistrate. For the purpose of the latter alternative the Mutiny Act of 1717[5] gave directions to the Justices of the Peace to arrest suspected deserters, and transmit them to Civil custody, notifying the same to the Civil Minister, the Secretary at War. The same provision is found in the Mutiny Act 1872,[6] and the direction given therein to take "the man before the Justice nearest to the place of his apprehension," was inserted for the purpose of protecting the citizen from mistaken identity, and the loss by such an error of his Common Law rights of citizenship.[7] The other case is where (as presently mentioned) the Officer and Soldier are on board a ship of war, commissioned by Her Majesty, under which circumstances all discipline and authority

[1] Vol. I. p. 188.
[2] Vol. I. p. 177; Vol. i. M'Ar. C. M., p. 433, citing G. O. of 1st Feb., 1804.
[3] Vol. II. pp. 7, 33. [4] Ib., pp. 17, 47. [5] Sec. 35. [6] Sec. 34.
[7] Wolton *v.* Gavin, 16 Q. B. Rep., p. 75.

over all persons on board are vested in the Naval Officer commanding the ship.

42. II. As to offences, the intention of the Code must be plainly declared, "for every penal clause must be interpreted strictly, and not be extended by construction."[1] The offence must have been committed within the period limited—three years. The Law Officers, in 1718,[2] advised the Crown that the expiry of the Annual Act did not prevent the trial and punishment of the offender under a succeeding one, and in the one of 1760 the limitation[3] of three years was inserted. The offence must also be one that is uncondoned.[4] "The performance of a duty of honour or of trust after the knowledge of a Military offence committed ought," wrote the Duke of Wellington, "to convey a pardon,"[5] and, according to his practice in the Peninsula, it did do so. "No man should be put on duty with a Court-martial hanging over his head."[6] The discharge of duty involves condonation; and if the Crown, with a full knowledge of an offence, permits an officer to resign his commission, that would, I apprehend, be such a condonation, that he could not be put upon his trial before a Court-martial.[7]

43. Crime which is Local under the ordinary rule of Law, is not so under the Military Code.[8] Military, but not Civil, Crime may, therefore, be committed in one, informed against in another, tried and punished in a third Colony or place.[9] "The Military

[1] Lord Tenterden in Proctor *v.* Mainwaring, 3 B. and Ald., p. 147.

[2] Vol. I. pp. 508, 517.

[3] After this period the law (as laid down in America) is that the Court-martial has no jurisdiction, and the defendant's consent to trial would not avail. Vol. I., Attorney-General's Opinions, 1820; Wirt, p. 383; vol. vi. ib., 1853; Cushing, p. 239; 1854, p. 507. Sir James Wallace so advised the India Office in April, 1781 (No. 288 of India Office Cases).

[4] 349 of Queen's Regulations, 1868:—"A Soldier charged with committing an offence should be put in confinement, as directed by the Articles of War, and ought not to be permitted to perform any duty whatever (except carrying his own arms and accoutrements in marching) until his case is disposed of. If, however, by error, such an offender has been permitted to perform any duty, he shall not thereby be absolved from liability to punishment for his offence, but may, if the proper authority shall think fit, be summarily punished, or be brought to trial before a Court-martial, according to the circumstances of the case."

[5] Ibid. [6] Vol. vi. Desp., p. 414, and Vol. iv. p. 593.

[7] Vol. ix. Attorney-General's Opinions, 1858, Black, p. 184. [8] Vol. I. p. 187.

[9] Colonel Crawley was tried at Aldershot by a General Court-martial sum-

Code operates against offenders," wrote Sir Charles Gould[1] in 1753 (and the Mutiny Act[2] has since been framed so as to accord with his opinion), "not as inhabitants of this or that particular district, but as Soldiers in His Majesty's Service, having as such no stated commorancy; therefore His Majesty's Forces may be considered, however dispersed, as members composing one body, regulated by peculiar Laws, and altogether distinct from the province in which they are eventually stationed."[3]

44. It is said, in contradiction to this doctrine, that Military Law is so far Local that the jurisdiction of Military Authority cannot be exercised and enforced in a Foreign Country, unless the Army be in hostile occupation of it. In many instances, as affecting the life, limb, or personal liberty of the offender, this may be found practically to be the case—arising, however, from the action of the Civil Tribunals of the country where the Army may be located, and not from any exception in the rule as laid down in the last paragraph. Should our Army be passing through a Neutral State, the condition upon which this innocent passage would be granted would be that of the observance of a strict discipline[4]—a condition which could

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moned by the Commander-in-Chief, and honourably acquitted of alleged wrong committed in India. P. P. 96, 4 March, 1864.

[1] Vol. I. p. 539.

[2] 1770, 10 Geo. III. c. 6, sec. 58; 1815, 55 Geo. III. c. 108, sec. 29; 1829, 10 Geo. IV. c. 6 sec. 5; 1872, 35 Vic. c. 3, sec. 7; *Re* Blake, 2 M. and Sel., p. 428.

[3] Where the Court is exercising special jurisdiction over local offences under delegated Statutory authority, this (as the Crown was advised in 1733) must be done within the limit where both such jurisdiction exists and the crime was committed.*

[4] As to this, see Lord Stowell's remarks in "The Twee," 3 Ca., Rob. Rep., p. 352; Wheat. 'International Law,' Part iv., chap. 3, sec. 8; Halleck, chap. 22, par. 5; Twiss, 'Law of Nations (War),' sec. 218. The Army in Portugal was of course (as to Military Crime) governed by our Courts-martial; but when Civil Crime (such as Murder) was committed, the Duke sent the offender for trial before the Local Civil Courts. "My opinion is," wrote Wellington, of a Soldier who had committed Murder, "that he, and all guilty of similar offences, ought to be tried according to the Laws of the Country; but, if the [Portuguese] Government prefer that we should take cognizance of these offences as being of a Military nature, we will do so at once in every case, but they must assist us in obtaining Witnesses to come forward and give their testimony on oath."—Vol. iii. Gur. Desp., p. 350. See also pp. 461-462, where the Law was to take its course; and in January, 1811, where he orders a Soldier to be given over to the Civil tribunals to

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* L. O. Reports, vol. i. p. 529.

not possibly be observed by the General in Command, unless by the comity of the Neutral State, its Legal Tribunals by non-interference or otherwise, upheld his authority and the Jurisdiction to enforce such discipline by our Courts-martial.[1] On the other hand, it is easy to suppose that Independent States would generally refuse to recognize our right to arrest and punish as Military Deserters those who may be otherwise commorant within their territories.[2]

45. One exception to this rule—that a Military Offender may be tried in any place—must be made in the case of Troops serving as Marines and sailing as passengers on board Her Majesty's Ships of War in Commission. In July, 1795, the question appears to have arisen from the Officers of the Navy claiming paramount authority over everyone within the Ship, and that every Offender against discipline should be tried by Naval Officers forming a Court-martial under the Navy Discipline Act. Lieutenant Fitzgerald was, therefore, placed upon his trial before a Court so formed "for having behaved with contempt to the Captain of his ship, his Superior Officer, when in execution of his office." He refused to plead or to recognize the authority of the Court; but he was sentenced by the Court to be dismissed from His Majesty's Service, and to be rendered incapable of ever serving His Majesty in any Military capacity.[3]

46. This case, unless promptly disposed of, was likely to give rise to animosity between the two Services, therefore an additional Act of War (now 191 of 1872), and the instructions contained in a Letter from the Duke of York to General Sir R. Abercrombie (printed in the Appendix), were promulgated to the Army on the 24th and to the Navy on the 28th October, 1795. Against these arrangements a protest was made by the Admirals of the Fleet. The Soldiers serving as Marines were withdrawn from the Ships, but these disciplinary arrangements remained without modification. Whenever the two Services came into united action,[4] the different Officers in Chief Command

be tried for the murder of a woman, vol. iv. *ib.*, p. 502. The question raised in this paragraph came before me when the Guards' Band went to America in June, 1872. [1] Story's Conflict, sec. 38. [2] Forsyth's Cases, p. 468.

[3] Vol. i. M'Ar. (1813), p. 408.

[4] See Private and Confidential of July, 1810, by the Admiralty and Commander-in-Chief to Naval and Military Officers.

were ordered to govern themselves by the Articles of War and Admiralty Instructions of 1795.

47. As the Articles of War were silent as to the Jurisdiction of a Military Court-martial on board ship,[1] Colonel Talbot—probably ignorant, in 1800,[2] of the Regulations of 1795—held a Regimental Court for the trial of a Soldier on board a Man-of-war. This was made a subject of complaint on the part of the Admiralty; whereupon a General Order of the 19th April, 1800, was issued, declaring that holding a Military Court-martial on board His Majesty's Ships of War was contrary to the rules and discipline of the Navy, and on no account to be practised. All measures of that nature were to be suspended till the disembarkation of the Troops; but that such summary punishments as might be needful should be inflicted under the authority of the Naval Officer.

48. The arrangements at present in force are these:—The Naval Discipline Act, 1866,[3] brings all Military Officers and Men, while on board such ships, under that Act "to such extent and under such regulations as any Order in Council shall direct;" and such an Order, recently issued (Appendix H), declares that, when the Army is embarked to serve as Marines, they shall be treated as such; and when as passengers, they shall conform to the discipline of the Navy, and consider themselves under the command of the Senior Naval Officer. The power of arrest, therefore, passes away from the Military to the Naval Officer; and unless summary punishment by the Naval, with the concurrence of his own Officer, be inflicted, the Prisoner is removed from the ship for trial by a Military Court-martial.

49. The channel for, or agent in, the arrest is usually the Adjutant either of the Regiment or of the General, according to the nature of the offence or the status of the offender; but the authority is always exercised in the name of the Commanding Officer.[4] The external order of a Camp or Barrack may in some measure be said to be left in the hands of the Military Guard or Sentry posted around it by the Adjutant of the General or

[1] This original Article is pasted on to the MS.
[2] Vol. i. M'Ar., p. 43.
[3] 29 & 30 Vic. c. 109, Sec. 88, and Art. 191 of 1870.
[4] Art. 34 of 1717, and Art. 14 of 1872.

Colonel in Command, for "The Adjutant is to a Regiment," wrote Adye, "in many respects what a Sheriff is to a County: he is the person who is to superintend the execution of every Judgment, and the inflicting of every Punishment."[1] His subordinate assistants are the Sentries or Guards whom he has posted. "I consider a Sentry," wrote the Duke of Wellington,[2] "as a depository of the Public authority at his station, and that all men, however high their rank, are bound to obey" the orders he has to give them. Over those subject to the Military Code the Sentry acting within his orders has therefore supreme power; and in case of disobedience, he or rather the Officer of the Guard on the warning of the Sentry, has authority under the Articles of War to place the offender in arrest or confinement until released or tried by a Court-martial.[3]

50. The legal remedy which is open to any one placed under Military arrest which he deems to be unlawful, is an application to the Queen's Bench for a writ of Habeas Corpus that he may be brought up before that Court and forthwith discharged. The case of Wolfe Tone,[4] in 1798, is possibly better known than any other, from the circumstances of the time, and from the fact that he had been ordered for execution before the writ was applied for. Other cases have, however, arisen, as Blake's,[5] in 1814, where the Court remitted the prisoner to Military custody, and Douglas's case, in 1842,[6] where the prisoner was discharged. It is admitted that the Jurisdiction of the Queen's Bench extends over persons held in Military custody, and that it will be exercised with the view of determining, *according to the rules of Military Law*, whether the custody is or is not lawful.

51. It is clear that no privilege of Parliament will exempt the accused from Military arrest or subsequent trial by Court-martial. It is usual to communicate the fact of such an arrest to the Speaker of that House of which the Prisoner happens to be a Member, and the trial proceeds as in ordinary course.[7] Where a Member of the House of Commons was cashiered by a

[1] Ed. 1798, p. 93. [2] Desp., Vol. iii. pp. 612, 613.
[3] See note GG on this subject, Vol. II., p. 474. [4] Vol. II. p. 169.
[5] Vol. I. p. 172. [6] 3 Q. B. Rep., p. 830. [7] Vol. I. p. 177.

Court-martial, he was expelled the House on a record of the trial being brought up and read by the Clerk at the table.[1]

52. The arrest of an Officer is generally "open;" but it may be "close," at the discretion of the Superior Officer. The arrest of a Soldier is "confinement," and, if necessity requires it, even in irons, according to the ruling alike of the Common Law Courts and the highest Military authority.[2] This distinction between "arrest" and "confinement" is found in both the Codes of 1717 and 1872.[3] If the Officer violate the first, he is to be cashiered; or the Soldier the other, his punishment—under the Code of 1717—was that of death as a Deserter, and under the Code of 1872 is according to the Act and the usage of the Service. The reason for the origin of this distinction in punishment was obvious. The Officer gave bail to the Crown in the value of his commission, but the Soldier—maybe a criminal or conscript—would too gladly have escaped from the Service, and certainly from Punishment at any time.

53. Military arrest or confinement is recognized as legal custody, with which the Civil Tribunals cannot interfere at the instance of a Creditor for a Civil debt.[4] If during its continuance the Prisoner should be charged with heinous crime or a large pecuniary obligation, it may become the duty of the Superior Officer to render the Prisoner's person up to the Civil Magistrate—or his escape impossible.[5] Where his arrest or confinement is at an end, care should be taken that his discharge from Military should not facilitate his escape from Civil process; and if he be an offender against the Criminal Law, he should, according to the directions of the Articles of War,[6] be handed over to the Civil power.

54. Both Codes[7] make it obligatory upon the Officer commanding the Guard, or the Provost-Marshal, to receive and keep, till released by lawful Military authority, any Prisoner committed to his charge by a Superior Officer. The Articles of 1742 required the order for arrest to be in writing, and those

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[1] Cawthorne's case, 51 Com. Journ., p. 655. [2] Vol. I. p. 169.
[3] Arts. 15 and 20 of 1717, and Arts. 18 and 69 of 1872.
[4] Jones *v.* Danvers, 5 Mee and Wels., p. 234.
[5] See Keighley *v.* Bell, 4 Fos. and Fin., p. 796. [6] Vol. I. pp. 169-171.
[7] 1717, Art. 44; 1872, Art. 18.

of 1748 that the crime with which the Prisoner was charged should also be stated. So the Law stood till 1855,[1] when the Articles were altered by making it optional for the Committing Officer to state the charge at the same time, "or without unnecessary delay."[2] All, therefore, that the receiving Officer has to do is to satisfy himself that the Prisoner is one subject to the Military Code—for he would probably hold any one else at his peril. Beyond this inquiry he has no responsibility, for—to use the words of a learned Judge—"the duty of receiving and keeping a prisoner arises *eo instanti* as soon as he is presented." Whether the crime be Civil or Military, his duty and obligation are the same.[3]

55. That no Prisoner might remain in custody without the knowledge of the General or Officer in Supreme Command, the Articles of 1672[4] provided that within twenty-four hours notice of the arrest and of the cause thereof should be given to him; and a similar provision is found in the Codes of 1717 and 1872. Thus, within twenty-four hours after the commitment, or as soon after as the Officer shall be relieved from his Guard or duty, he shall give in writing to the Officer Commanding, the Prisoner's name and crime, with the name and rank of the person who committed him, under the penalty of being cashiered for his neglect.[5]

56. The duration of imprisonment prior to the Prisoner's trial was by the Articles of 1717 limited "to five[6] days at farthest." In 1742, this period was extended to eight days, and so continued till the year 1865, when the Article provided "that no Officer or Soldier should continue in arrest more than eight days, or until such time as a Court-martial could be conveniently assembled,[7] adding the penalty of cashiering upon any Officer "who when in command should unnecessarily detain any prisoner in confinement without bringing him to trial."[8]

57. Upon whom the responsibility of arrest and detention may ultimately fall depends on circumstances. The primary

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[1] Art. 20.

[2] How far the Officer would be bound by this statement is uncertain. Hannaford *v.* Hunn, 2 Car. and Pay., p. 155. [3] Wolton *v.* Gavin, 16 Q. B. Rep., p. 70.

[4] Art. 72. [5] 1717, Art. 44; 1872, Art. 72. [6] Art. 40.

[7] Art. 19; Vol. I. p. 171. [8] Art. 74.

responsibility is with the Committing Officer,[1] then on his report to the Superior Officer, with such Officer, who again in doubt or difficulty may reasonably refer the case to those who are in supreme command over him, and these again to the Responsible Ministers of the Crown. Thus the chain of responsibility is, as elsewhere shown, preserved, and the detention of the Prisoner may be unavoidably postponed beyond eight days, or as many weeks. Sir H. Hardinge assured the House of Commons[2] that it is often wholly impossible to summon a Court without a long intervening delay,—a fact which no one conversant with the subject can doubt. However, in the year 1863, serious misunderstanding, with subsequent litigation, arose; and in 1866 it was thought expedient to remove the limitation of eight days from the Military Code, the Articles of War being altered to a direction that the trial should be had "within a reasonable time."[3]

58. But against oppression the Prisoner has a legal remedy. In Captain Wall's case, where he was kept in prison for nine months at Gambia before a Court-martial was summoned, he recovered 1000*l.* damages against the Committing Officer, whose conduct Lord Mansfield stigmatized as "malignant." In words that cannot be too often repeated, he said: "The principal inquiry to be made by a Court of Justice in such cases is how the heart stood. If there be nothing wrong there, great latitude will be allowed for misapprehension or mistake."[4] In another case, where a Soldier was imprisoned by an Officer for disobedience to orders made under the colour, but not within the scope of his Military authority, a remedy at Law was said to exist, though the prosecution of it was deprecated by the Court.[5]

59. The Common Law Courts would not, therefore, give damages for the fair and honest exercise of Military authority, though exercised on mistaken facts or inferences, and greatly to the Prisoner's injury. Nor would they interfere by ordering the Prisoner's release under Habeas Corpus,[6] because the

[1] Warden *v.* Bailey, 4 Mau. and Sel., p. 410; Keighley *v.* Bell, 4 Fos. and Fin., p. 800.

[2] 73 H. D. (3), pp. 862, 1369. [3] Vol. I. p. 172. [4] Vol. II. p. 155.

[5] Warden *v.* Bailey, 4 Taunt. Rep., p. 89. [6] *Re* Blake, 2 Mau. and Sel., p. 428.

Prisoner's confinement exceeded eight days.[1] Such attempts have been made in former times, and repeated in recent years; but, meeting with no encouragement whatever from the Judges of the Superior Courts at Westminster,[2] they have signally failed.

60. The Commanding Officer of the Prisoner has the immediate control of the arrest, and not the Court-martial before whom he may be ultimately arraigned. While the Prisoner is before them, the members of the Court must see that he has such freedom as will facilitate his defence; but the Court, when he leaves that tribunal, cannot order the detaining Officer to give him full or partial freedom either to see or to examine his Witnesses, but this discretion rests solely with the detaining Officer.[3]

61. But the power of duress or confinement, which every Commanding Officer must occasionally exercise over his men for purposes of discipline, must not be confounded (as unfortunately in recent years it has been) with Military arrest strictly so called under the Articles of War. "Some," said Lord Holt, speaking of Civil authorities, "have power to imprison by law, who do not do it by way of punishment, but by way of prevention; as a Constable may commit one to prevent a fray."[4] The same rule and principle are obviously more needful in Military than in Civil strife, to govern martial men than unarmed citizens, and therefore, to prevent the commission of crime, "I have kept whole divisions of the Army under arms for days. No crime could then be committed. In the same manner I can have half-hourly or hourly roll-calls or parades. I can confine men to barrack yards; I can send them out to walk in a town in squads, in charge of a Non-commissioned Officer."[5] So wrote the Duke of Wellington in the year 1829, and was unrebuked: but in 1863, when a General Officer (who was neither a Military tyrant nor a novice in the art of War) placed three Non-commissioned Officers under arrest to withdraw them from crime and to save a Regiment on the

[1] Warden *v.* Bailey, 2 Mau. and Sel., p. 406.
[2] Dawkins *v.* Rokeby, 4 Fos. and Fin., p. 806.
[3] Benet, p. 72; Simmons, p. 120.
[4] Grenville *v.* Coll. of Physicians, 12 Mod. Rep., p. 388.
[5] Duke of Wellington's Memorandum, Vol. viii. Gur. Desp., p. 346.

Indian Establishment from mutiny, he was rebuked by one forgetful of Lord Holt's ruling, and told that the Military Law did not authorize detention or arrest of any one to save him or his Regiment from the catastrophe of crime.

62. The rule of the Military Service may be accepted as laid down in these words by a General of experience:—"The *Custom of War*[1] most undoubtedly throws on Commanding Officers of whatever rank, the duty of preventing mutiny, or any crime or action which might be held to tend to such a result. In like manner, it throws on Commanding Officers the duty of arresting crimes of violence, or what may tend to them. Thus, when an Army is in the field, it is not an uncommon occurrence to confine all the troops for several days together to their camps, to prevent pillaging or cruelty to the inhabitants of the seat of war. On such occasions, the whole Army is, as it were, under arrest for the prevention of crime, and any Officer or Soldier breaking that general arrest of the Army is liable to the severest punishment, including that of death, for disobedience of orders,—a punishment, under certain circumstances, not unlikely to ensue. It was the practice of the Duke of Wellington to add a physical fatigue in addition to the mere confinement to camp; for we read, in his Orders given during the Peninsular War, that whole divisions were at times kept for long periods under arms, when it was deemed an imperative necessity to stop plunderings. It will be further admitted that, in Military usage or in the custom of war, is included the redemption of Military responsibility; and, consequently, that any Commanding Officer failing to redeem his responsibility for the prevention of crime, is liable to be removed from his command, and to be otherwise dealt with according to law, because he has not vindicated the custom of war, or in other words, Military usage, for the maintenance of discipline."

No doubt in this, as in every other act of Military authority, the Officer, if shown to have acted oppressively, would be brought to Court-martial and punished; but the legal power of the Commanding Officer to confine them to barracks for purposes of discipline cannot be questioned.[2]

[1] War Office Records of the Crawley Case, p. 319.

[2] See Col. Orde's Case, 1813, 26 H. D. (O. S.), p. 1150.

CHAPTER VI.

THE ARRAIGNMENT, TRIAL AND SENTENCE OF THE PRISONER.

1. WHEN provision was made, under the Military Code, for the trial of an offender by a Court composed of a President and twelve Officers, it may reasonably be presumed that the controlling analogy which suggested this tribunal, was the Civil Administration of Justice by a presiding Judge appointed by the Crown, and twelve Jurymen summoned by the Sheriff to deal with all the questions of Law and Fact that might be brought before them: in truth, that those Statesmen and Warriors who originally framed the Military Code desired, as most Englishmen would do, to secure the administration of Justice to their fellow countrymen, and therefore, that they established the "Military" with as much similarity to the "Civil" Tribunals of the country, as the circumstances under which these different Jurisdictions were to be exercised would admit of.

2. In following the subject of the present Chapter, it will be seen throughout, that the same rough analogy has been preserved, and that the "Military" has been gravitating towards the "Civil" Administration of Justice. In the various changes that during the last two centuries have been made in the rules of procedure, the main desire—that of securing to the Prisoner a fair trial—is conspicuous. Though Military, like other tribunals, may be fallible, the spirit of Justice leavens their proceedings; and "these Courts," to quote the words of the Court-martial Commissioners, "have the confidence of the Army,[1] and are satisfactorily spoken of, even by those who have been subjected to their jurisdiction."

[1] 2nd Rep., p. 3.

3. The method in which Justice is to be administered, will be seen by reference to the "Regulations and Forms of Procedure" printed in the Appendix. What is there given will not be anticipated here; but it will be assumed, that as each Officer is required to make—so each reader will have made—"himself well acquainted with the Mutiny Act, Articles of War, and Queen's Regulations, so far as a knowledge of these is necessary for the performance of the duties of members of Courts-martial."[1] As supplementary to the information there given, this text is written.

4. Consequent upon arrest, follows a preliminary examination at the instance of the Commanding Officer: 1st. As to the Crime or Offence charged against the Prisoner; and 2ndly. The evidence upon which it is to be supported.

In the earlier Codes, this duty appears to have devolved on the Judge Advocate; for the Articles of 1662-3,[2] empowered him, "for the information and discovery of all Military offences," to take information or depositions on oath, as occasion should require, of all matters triable before a Court-martial; and those of 1666,[3] provided that within forty-eight hours after arrest, the Judge Advocate should be informed of the crime and arrest, that the Prisoner might be forthwith tried or discharged. The Articles of 1672[4] and 1717[5] threw the direct responsibility of the prosecution upon him, "in all criminal matters which concerned the Crown" (as being both the Informer and Prosecutor before the Court), and in lesser matters, the practice was for the Judge Advocate to investigate the case, taking affidavits, if need be, from the Witnesses, to be laid before the Court at its future meeting.[6]

5. The "Marshal's" Court was, therefore, never that of the Judge Advocate, but of the Military Chief or Hierarch, against whose rules of discipline the Officer or Soldier (as the case might be) had offended. Before that Tribunal the Judge Advocate had to appear as the Informer and Prosecutor until 1742,

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[1] W. O. Circular, Army and Reserve Forces, 1872. [2] Art. 23.
[3] Sec. 13, Art. 7. [4] Art. 64. [5] Art. 22.
[6] Mr. W. Blathwayte's Instructions to Mr. Clarke, 19th Feb. 1694-5, C. M. Bk. (114), p. 127.

and as the Prosecutor until 1829, thereby to ensure, as far as possible, what is even now[1] desired, viz., that "No accusation should be preferred which could not be maintained"—"a practice" declared by authority to be "both highly inconvenient and injurious to the Service."

6. In ordinary cases, the Offences of Soldiers are now disposed of—at the instance of the Commanding Officer, and without the intervention of the Judge Advocate—by the Regimental Court. Under the Code of 1717, the primary Jurisdiction, except in Capital cases, appears to have been in this Court; for, in addition to the powers (which might be the subject of appeal to a General Court), of punishing the Soldier under the Mutiny Act "for immoralities, misbehaviour, or neglect of duty,"[2] the Articles declared specifically,[3] "That all controversies in the Regiment between the Soldiers and their Officers, relating to their Military capacities," should be there determined; and that, on notice of the arrest, the Colonel[4] should summon this Court for the punishment of the Prisoner. If the Regimental Court should adjudge the Case to be beyond its Jurisdiction, the Colonel was then to send to the Secretary at War the "Proceedings, proofs, and examinations made therein," for an order to summon a General Court.

7. Where the nature of the offence, and the limit of the Jurisdiction are matters of doubt, the Commanding Officer, at the present time, forwards a report of the facts to the General of the District; and it is left to his discretion to determine whether by any, and which, Military Tribunal the prisoner shall be tried—his ruling being final. A discretion would appear to have always been held by the General in cases where, by the Military Code, the Jurisdiction of the Regimental on the one hand, or a General Court on the other, was not defined; for though a certain original Jurisdiction was given to a General Court by the Code of 1717, in cases (*a*) Of Crime punishable with Death,[5] and (*b*) Of an Officer having a complaint to make against his Superior,[6] or (*c*) Having himself committed

[1] Sec. 735 Queen's Reg., 1868, and sec. 16, art. 8, of 1828, and par. 15, *post.*

[2] First inserted in the Mutiny Act, 12 Anne, c. 13, sec. 3, and continued till the year 1851. Vol. I. pp. 153, 154.

[3] Art. 21. [4] Art. 40. [5] Art. 21. [6] Art. 19.

an offence—yet a discretion as to the selection of either Court was left to the General: in other cases, as (*d*) Of words used[1] in contempt of the General, or (*e*) Of waste[2] committed in Quarters or March; for the Prisoner was to be "punished according to the nature and degree of the offence, by the Judgment of a Regimental or General Court-martial."

8. In former times—that is from 1758 to 1828—a discretion as to the tribunal or authority by which the offender should be punished, appears to have been intrusted to the Committing Officer; for the Articles[3] of War directed him to give notice of the arrest to the Colonel, if the offence (of which he was to be the judge) were a neglect of duty in his own corps—or to the Commander-in-Chief in other cases. However, to secure greater uniformity in the administration of justice, the Articles of 1829[4] provided, as the Code of 1872[5] now remains, that no Commanding Officer shall give in vague or indefinite charges against a Prisoner, so that the trial may be before a Regimental instead of a higher tribunal; but that, in cases of doubt, each one shall (with the proposed charges) be laid before the General, for his decision thereon.

9. Assuming that the offence be one for trial by a Superior Court, the charges and evidence are sent up by the Colonel to the General of the district, for his directions to be given—whether a district or a General Court is to be summoned. Where dealt with by the District Court, the charges are (either with or without the aid and advice of the Judge Advocate General) framed, approved, and submitted to that Court, the President there acting as Judge Advocate. Where a General Court is to dispose of the case, the charges are then framed, approved, and submitted to the Judge Advocate General; and the Court—though summoned by the General—is aided by a Judge Advocate acting under deputation from his Legal Chief.

10. The policy of the Mutiny Act has been to provide that the Court shall be legally constituted, by having a Statutory quorum, 1st, under ordinary,[6] and, 2ndly, under extraordinary

[1] Art. 6. [2] Art. 30.
[3] Compare 1742, Sec. 15, Art. 22; and 1828, Sec. 16, Art. 28. [4] 91st.
[5] 140th. [6] See Mutiny Act, secs. 10, 12; Arts. of War, 107, 112.

circumstances; leaving with the Convening Authority the discretion to summon a larger number of Officers to serve with the quorum, and to determine whether the Court shall be constituted under one quorum or the other. In either of these circumstances, the discretion of the Convening Authority may be considered as absolute. In the American Code thirteen are to be summoned, where that can be done "without manifest injury to the Service," and Mr. Justice Story held (in "Martin *v.* Mott"[1]) that this was a direction only to the Convening Officer, and as a matter submitted to his sound discretion—that his decision in summoning a less number must be considered as conclusive.

11. The number of the Judges is therefore, within certain Statutory limits,[2] at the discretion of the Crown and of the Convening Officer; in which respect the constitution of a Military varies from that of the Common Law Court, where twelve men (neither more or less) form the Jury by whom the issue is to be tried.[3] If in the course of the Civil trial a sworn Juryman retires or dies, the trial is at an end; but if Officers, thus supernumerary, withdraw from necessity and by leave of the President, the fact and the cause of it are stated on the Record of the proceedings, and the trial proceeds; for so long as the legal quorum exists a Court-martial is legally constituted.[4]

12. The various crimes and punishments which each of these Courts can try and award, are to be found in the Mutiny Act and Articles of War. As in their method of procedure these Courts have rules of a common origin, and as those who as members take part in the administration of Justice have authorities and duties so similar in each Court, they may be treated of together. As the highest in authority, the General Court will be that under consideration, with such notice of the differences, if any, in practice, as occur in the District and Regimental Courts.

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[1] Vol. xii. Wheat. Rep., pp. 34-35; Vol. ii. Attorney General's Opinions, 1832; Tiney, p. 534, and Vol. vi. ib., 1854; Cushing, pp. 506-510.

[2] Mutiny Act, secs. 8, 9, 10, 12.

[3] Muirhead *v.* Evans, 6 Exch. Rep., p. 447.

[4] Vol. i. M'Ar., pp. 234-236, 419-421.

13. Of every Court the President is the principal member appointed by the Convening Officer, and responsible to him for the order and regularity of its procedure. "He is charged," wrote the late Sir Charles Napier, "with all the duties and details of conducting the trial—he makes the members take their seats according to their rank—clears and re-opens the Court when necessary—preserves order—collects the votes; no questions are put but through him, or by his permission, and that of the Court."[1] Should the President, in the course of the trial, happen to die or be obliged to withdraw, the next Senior Officer is sworn in as President, and—assuming, of course, that the Statutory quorum remains[2]—the trial proceeds as theretofore. These separate responsibilities were first assigned to him in 1829, by Articles[3] which remain in the present Code.[4] He is to seat the members according to their rank; and, having done so, no member can withdraw, except with his permission. If intemperate words be used by any member, they are to be taken down and reported by the President to the Convening Authority. And, finally, he is held responsible that no reproachful words be used to Witnesses or Prisoners; and that every person attending the Court is treated with proper respect.

14. The President should therefore hold a strictly impartial bearing towards the Convening Authority, on the one hand, and the Prisoner on the other. So far back as 1737, the Crown was advised by Sir D. Ryder (as Attorney-General) not to permit the President to confirm the proceedings of the Court, for "The Articles of War[5] suppose," as he wrote, "the Sentence to go through another examination," "which would not be the case if the President is to confirm his own Judgment. I do not find there has ever been any instance of the like power granted to a President, and it seems to me not advisable." By the Articles of 1847,[6] as amended in 1854,[7] and as they now stand,[8] it was provided that the President shall in no case be the Confirming Officer, or the Officer whose duty it has been to investigate the charges on which the Prisoner is to be arraigned.

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[1] Sir Charles Napier, G. O. of 16th May, 1850.
[2] Simmons, p. 207. [3] Art. 94. [4] Art. 162.
[5] Vol. I. p. 515. [6] Art. 115. [7] Ib. [8] 1872, Art. 114.

Even the proceedings of a Detachment *General* Court, which the President may convene,[1] must be confirmed by higher authority —the General Officer in Command of the Army.[2]

15. A Deputy or Acting Judge Advocate attends each General Court-martial: in the United Kingdom on the deputation of the Judge Advocate General, and elsewhere on the appointment of the General; and he is sworn not to discharge any specific duty, but only to secrecy.[3] District and Regimental Courts have no such Officer. In 1860[4] it was expressly provided that the Judge Advocate should no longer be the Prosecutor, nor can he be a Witness for the prosecution in the Court upon which he is attendant.[5] The Articles of 1639[6] imposed upon him the duty of recording the Proceedings, and he now holds the same responsible office. "He cannot interfere with anything of his own authority in the privileges of a Court-martial—for which the president and members are alone responsible."[7] He should be (in Lord Brougham's[8] definition) "the assessor of the Court—standing between the Prisoner and the Court;" or (as Lord Cranworth[9] defined his office) "the Judex Advocatus," —a Judge called to assist the Court—though forming (I apprehend) no constituent part of it. No challenge can be made to the Judge Advocate,[10] and he may withdraw and resume his duties,[11] or, if necessity obliges it, the official acting as such may be changed in the course of the trial without disturbing the order of the Court's procedure.[12]

16. The office of Prosecutor, since the Judge Advocate has been deposed from it, has not been assigned to any other official. In some cases the Adjutant acts in that capacity, and in earlier times it would appear that the Major discharged that duty. Adye suggested, in 1794, that the Adjutant should never sit as a member of the Court; because, if it became his duty

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[1] 1872, Art. 114. [2] Sec. 12 of Mutiny Act 1872.

[3] In America it has been thought that the Judge Advocate not appearing on the Record of the Court-martial to have been sworn, the proceedings were irregular and void. 1838, Grundy, Vol. iii. Attorney General's Opinions, pp. 396-397. [4] Art 163.

[5] Art. 159 of 1872. For the Prisoner he may be. Adye, p. 195.

[6] Vol. I. p. 438, and Art. 61 of 1672. [7] Sir C. Napier, Vol. ii. p. 364, note.

[8] Vol. II. p. 363. [9] In 1864. 173 H. D. (3), p. 1174.

[10] Benet, p. 81; Simmons, p. 176. [11] Benet, p. 98. [12] Simmons, p. 208.

ultimately to put the Sentence into execution, the policy of the Law would be infringed and his responsibility increased by having the office of Judge and Executioner discharged by the same person.[1] If the Sentence should prove illegal, he would lose his legal immunity as Sheriff, by having awarded the Sentence as Judge. However, whoever the Prosecutor may be, he can also be a Witness,[2] though, if for the Crown, he should then give his evidence before any other person. The union of duties as Advocate and Witness finds no favour in the Common Law Courts.[3]

17. The Members, as well as the President, act under the authority of the General or other Convening Officer, and in subordination to the President as their Superior Officer. When attendant and sworn as members, the Court is formed, and the Prisoner may be tried. But, as in Criminal Procedure for life or limb, the Common Law allows of Challenge against the Jury,[4] so by Custom[5] first and by the Code since 1847, this right—which, strictly speaking,[6] should be exercised before the Members are sworn—has been secured to the Military Prisoner. Challenge by the Crown appears always to have been allowed—the cause being assigned and its relevancy or validity being decided by the Court. In the Mutiny Act of 1847[7] the right was secured to the Prisoner (without mention of the Prosecutor), subject to the conditions set forth in the 152nd Article of War, 1872.

18. The object of all interested in the administration of Justice is to obtain a competent and impartial tribunal—one actuated neither by "partiality, favour, or affection." Keeping these objects in view, the Judges must all be Officers of competent rank,[8] with no professional or pecuniary[9] interest in the

[1] Pp. 93, 94.

[2] In America that the prosecutor may give evidence, see (1841 Legare) Vol. iii. A. G., p. 714. [3] Cobbett *v.* Hudson, 1 Ell. and Blac., p. 12; 17 Jur., p. 488.

[4] Barrett *v.* Long, 3 H. of L. C., p. 409.

[5] Tytler (1814), pp. 221-225; Adye, p. 168.

[6] This is not always insisted on. Tytler, p. 232. [7] Sec. 14.

[8] Challenge could not be made on the ground of age, but a juryman must be twenty-one and under sixty years. 6 Geo. IV. c. 50. sec. 1. See Vol. i. M'Ar., p. 277. [9] Bailey *v.* Macaulay, 13 Q. B. Rep., p. 829.

result of the case. Advancement by the Prisoner's dismissal from the Service, or taking part for or against him in any previous inquiry[1] into this or any other proximate matter, would be good cause of Challenge. If the Officer be a Witness for or against the Prisoner, he ought not, if possible, to act as a member of the Court; but, should he do so, he is not thereby precluded from giving his testimony publicly to the Court[2] as a Witness, sworn, examined, and cross-examined, rather than to his compeers privately. As the Crown nominates the Members and these determine the Challenges, the Prisoner might, by their joint action, be deprived of essential testimony,[3] unless the Members of the Court could be called to testify on his behalf. The Challenge, with the Decision, should appear on the Record[4] of the Proceedings; and if other Officers are easily attainable, it may be well to allow any feasible objection rather than that the procedings should be annulled by the Convening Authority, or that the Prisoner should raise any fair claim to be considered a martyr to a supposed injustice.[5] If no Challenge be made, the Prisoner would,[6] I apprehend, be bound by the Finding and Sentence of the Court, though some of the Members, if challenged, would have been removed from the panel.

19. The Challenge having been disposed of, the Judges are sworn—in a General Court by the Deputy Judge Advocate, and in the other Courts by the President—on the Holy Evangelists (or a Prayer-book[7] containing the Gospels) if a Christian, or on the Pentateuch if a Jew. These oaths, like many others, define the duty which those who take them have to discharge.[8] In substance they have remained the same for the last 200 years, and contain the measure and method of Justice to be administered by a Court-martial.

"In the Military, as in the Civil, system of Judicature," said

[1] Vol. i. M'Ar., p. 275; Queen *v.* Sullivan, 8 Adol. and Ell., pp. 831, 832.
[2] Burns's Justice, title "Jury," and Vol. ii. Tay. Evid., p. 1196, 1197.
[3] Vol. i. M'Ar., p. 274; Vol. ii. pp. 82-86; Adye, pp. 124-128, 196.
[4] Carmarthen *v.* Evan, 10 Mee. and Wel., p. 274. [5] Sir Charles Napier.
[6] King *v.* Sutton, 8 B. and Cres., p. 419; and Pryme *v.* Titchmarsh, 10 Mee. and Wel., p. 605. [7] Robeley *v.* Langston, 3 Keb., p. 314.
[8] See Lord Somers' observations on the oath of the Judges in the Exchequer in the Banker's Case, 14 Stat. Tri., p. 63.

Mr. Villiers,[1] as Judge Advocate General, in 1855, "there is a written and an unwritten Law—the one based on the Mutiny Act and Articles of War, the other upon Custom and Established Usage, recognized and applied in numberless cases. Both these branches of Military Law are recognized by the Legislature," for every member of a Court-martial is required by the Mutiny Act to take the oath there prescribed.

20. Upon referring to the Code of 1672,[2] it will be seen that Justice was to be administered under the sanction of an oath; the members of the Court being sworn to administer Justice "according to these Articles, or (when these assign no absolute punishment) according to their consciences, the best of their understandings, and the Custom of War in the like cases. In Anne's Reign the Judges were sworn against Bribery, "not to receive any gratuity or present, either directly or indirectly,[3] and (as in 1717)[4] to try the case "without partiality, favour, or affection;" and, upon doubt arising, which was not explained by the Mutiny Act and Articles of War, then according to conscience, as before directed.[5]

21. "This oath," said a learned Judge,[6] in a recent case, "is abundant to show, with respect to all matters which come under the cognizance of the Military Tribunals, they are subject to a test of Law which is different from that administered in a Civil Court, and it is to be according to Military usages and their approval; whereas here [in the Court of Common Pleas] we have a test according to Law and the custom of England—that is to say, the Law and custom which regulate ordinary transactions out of the Army."

22. "A Military Court," wrote the late Sir Charles Napier, "should be a Court of Honour; it is a bad system which turns the members that compose it into Attorneys at Law: they lose the frank, Soldier-like sense of their duty as members of a Court-martial with one grand conscientious duty to perform—that of acquitting the Prisoner against all legal rules of evidence, if they believe in their hearts he is innocent; and condemning him, if they conscientiously believe him to be guilty. In short,

[1] 137 H. D. (3), p. 1136. [2] Art. 60. [3] Bruce, p. 308. [4] Art. 22.
[5] Art. 152. These oaths were extended to Regimental Courts in 1805.
[6] Justice Willes, in Dawkins *v.* Lord Rokeby, 4 Fos. and Fin., p. 833.

the business of a Court-martial is not to discuss points of Law, but to get at the truth by all means in their power."[1] Certainly, if conclusive arguments be needed, they are to be found in these extracts for the Constitutional Dogma, that Military Offences, and those *only*, should be submitted to the arbitrament of Courts-martial.[2]

23. The Oath of Secrecy arises out of the necessities of the case. In early practice, the War Office Books[3] show that the finding of each Member came up before the Crown or General; and therefore, for the security of the Judges, the Oath of Secrecy was imposed as early as Queen Anne's Reign, and has continued to the present day. Even in the Civil Administration of Justice, Secrecy is not a principle wholly unknown to the Common Law. Grand Jurors[4] are forbidden by their oath,[5] on the grounds of Public Policy, from disclosing evidence, and other matters coming judicially before them. So, also, Officers of the Revenue Departments are forbidden by Statute,[6] and by their oaths, from disclosing even matters of fact otherwise needful for the Courts of Justice to be informed of.

After full explanation and debate as to its necessity, the oath[7] was first sanctioned by Parliament in the Mutiny Act of 1748,[8] with this limitation, unless disclosure was "required by Act of Parliament," which, in the following year,[9] was altered thus:—unless "required to give evidence as a Witness by a Court of Justice in a due course of Law."[10]

Constituted as a Court-martial is, and employed in the discharge of a duty often so invidious as to decide between a Brother Officer or a private Soldier and an offended General, it would be hopeless to expect impartial Justice unless the Ballot or secret voting was in such a case continued.

24. Before the Prisoner's trial proceeds, it may be well that the President should satisfy himself on one or two matters

[1] On Military Punishments, p. 36; and see his Life at Vol ii. p. 121; Vol. iii. pp. 108-136, Vol. iv. pp. 37 and 211. [2] Vol. I. p. 158.
[3] See Entry of Court-Martial 8 May, 1693, in Mis. Bk. 517, p. 70.
[4] Reg. *v.* Cooke, 8 Cav. and Pay., p. 584. [5] Burns's Justice, title "Jury."
[6] Lee *v.* Birrell, 3 Camp. Rep., p. 337. Taylor on Evid., vol. ii. p. 840.
[7] Vol. I. p. 168. [8] 22 Geo. II. c. 5. [9] 23 Geo. II. c. 4, sec. 5.
[10] As to disclosures to Parliament, 3 Hat.'s Prec., p. 35, note.

preliminary to the arraignment, ever remembering that he and the other members of the Court would be civilly or criminally responsible for all acts which would become wrongs if done beyond their legal authority or jurisdiction.[1] These inquiries should be,—that the Court is legally constituted (1) in the authority convening it, (2) in the number and qualification of its members.

25. I. "If he that gives judgment of death against a person," wrote Lord Hale,[2] "hath no Commission at all,—if sentence of death be commanded to be executed by such person, and it is executed accordingly, it is murder in him that commands it to be executed, for it was 'coram non judice.'" The Commission to hold Courts-martial must, therefore, follow strictly upon the language of the Mutiny Act—the authority under which their jurisdiction as Statutory Courts is to be exercised.

26. II. "It seems agreed," wrote Hawkins,[3] "that any judgment whatsoever given by persons who had no good Commission to proceed against the person condemned, may be falsified by showing the special matter without writ of error because it is *void:* as where a Commission authorizes to proceed on an indictment taken before A., B., C., and twelve others, and by colour thereof the Commissioners proceed on the indictment taken before eight persons only:" and Blackstone,[4] citing this authority, proceeds thus:—"Where a Commission issues to A. or B. and twelve others, or any two of them, of which A. or B. shall be one, to take and try indictments, and any of the other twelve proceed without the interposition or presence of either A. or B., in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the Commissioners; it being a high misdemeanour in the Judges, and little, if anything, short of murder if a person be executed." The qualification of every Officer as to the date and nature of his Commission, as of three years for a General Court, and of the Army or Militia[5] Service (as the case may be) should be

[1] Vol. i. M'Ar., pp. 269, 436; Vol. I. Chap. VIII. par. 92, and cases cited.

[2] 2 Pl. of Cr., Chap. xlii. p. 497, and Justice Heath, in Warden *v.* Bailey, 4 Taunt. Rep., p. 77; Lord Holt, in Grenville *v.* College of Physicians, 12 Mod. Rep., p. 388. [3] Vol. iv. p. 383 (ed. 1769). [4] See Bk. II. Chap. 1. sec. 3.

[5] Martin v. Mott, 12 Wheat. Rep., p. 35.

observed in the formation of such Courts for the trial of such offenders.

27. In the event of reasonable doubt, the President would do well to transmit the question to the Convening Authority for the decision of the Secretary of State, under whose Countersign the Royal Warrant for the Court has been issued. In former instances (the last being that of General Ross[1]), the papers were transmitted to the Judges, and now they would probably be sent to the Law Officers of the Crown for their advice; the Court being adjourned and the Prisoner remitted to arrest, until, by the reassembling of the Court, he can either be discharged or tried.

28. But, assuming the Court to be legally constituted in regard to the assembly and the qualifications of the Members, the President should not omit to consider other objections that may arise in regard—

1. To the Status of the Prisoner, or—
2. To the Crime for which he is arraigned;

for, as the Prisoner before a Court-martial seldom has the aid of legal advice, all questions of Jurisdiction need the scrupulous care of the President, whether or not they are urged at the hearing upon the attention of the Court.

29. The objection to the trial of the Prisoner may be—

(*a*). That he is a Civilian, and not amenable to the Military Code, or—

(*b*). Though amenable to the Military Code, that he is not arraignable before the Court as constituted by the Members, or—

(*c*). For the Offence charged against him.

30. These objections are of different weight and importance: because if either of the first two (*a* and *b*) prevail, no jurisdiction could rightly be exercised;[2] but the other (*c*) may assume the aspect of error only. As an illustration of the second objection (*b*), take the trial of an Officer by any other than a General Court,[3] or of a Militiaman by Line Officers. Neither of

[1] Vol. I. p. 180.
[2] Lord Holt, in Grenville *v.* College of Physicians, p. 392 *sup.*
[3] Vol. i. M'Ar., pp. 238-248.

these are, I apprehend, objections of personal privilege, like that of Peerage, which may be waived by pleading to the charge before the Court ;[1] but of Jurisdiction, which, if defective, no consent would remedy.

31. Or, as an illustration of the third objection (*c*), take the trial of Civil offences by Military Tribunals. The rule would, I apprehend, be one of error: for although "in this country," said Lord Loughborough,[2] "all the delinquencies of Soldiers are not triable by Court-martial, but where they are ordinary offences against the Civil peace they are triable by the Common Law Courts," yet "if a Commission of the Peace issue," wrote Lord Hale,[3] "this extends not to treason, neither can the Justices hear and determine all treason by force of their Commissions, for it extends only to felonies. If they take an indictment of treason and give judgment, this is most certainly erroneous ; but I do not think it makes them guilty of murder, for they were not without some colour of proceeding therein, because all treason is felony, and the King may, if he please, proceed against a traitor for felony." So, the Military and Civil Courts may be said to have, in some instances, a quasi-concurrent jurisdiction for the punishment of offences, which are either Military or Civil, according to the aspect in which they are viewed.

32. But the Prisoner may have doubts which either at this or at a later period he may take a legal method of solving, by applying to the Queen's Bench for a Writ of Prohibition, directed to the President and Members of the Court, commanding them to cease from the prosecution of the trial, upon the suggestion that the cause originally, or some collateral matter arising thereon, does not belong to Court-martial Jurisdiction, but rather to the cognizance of some other Court.[4] "This Court," speaking of a Court-martial, said Lord Loughborough, in Grant *v.* Gould,[5] "being established in this country to preserve law, the proceedings of it, and the relation in which it stands to the Courts at Westminster, must depend on the same rules with all other Courts which are instituted and have

[1] 12 Haw. P. C., Bk. 2, Chap. lxiv. Sec. 19. [2] Grant *v.* Gould, *sup.*
[3] 2 Pl. of Cr., Chap. xlii. p. 497. [4] 3 Step. Com., p. 703.
[5] 22 H. B., p. 102.

particular powers given to them, and whose acts therefore may become the subject of applications to those Courts for a prohibition. Naval and Military Court-martials, Courts of Admiralty and of Prize, are all liable to the controlling authority which the Courts at Westminster have from time to time exercised for the purpose of preventing them from exceeding the Jurisdiction given to them, the general ground being an excess of Jurisdiction where they assume to act in matters not within their cognizance."

The points, therefore, that may be raised upon Prohibition are mainly two: 1st, Is the Prisoner one over whom, in the words of the Mutiny Act, the Court-martial has jurisdiction? 2ndly, Is the offence charged against him one for which he is amenable to a Military tribunal? In either alternative, the Court-martial may be proceeding in error, or without jurisdiction over the Prisoner; when, in either case, his discharge from Military arrest would follow as a consequence.

33. But the Court being properly formed and acting within its Jurisdiction, the members are exempt from actions at Law for what they may do or say as such. "It is essential in all Courts," said Chief Baron Kelly, in a late case,[1] "that the Judges who are appointed to administer the Law should be permitted to do so under the protection of the Law, independently and freely, without favour and without fear. This provision of the Law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the Public, whose interest it is that the Judges should be at liberty to exercise their functions with independence, and without fear of consequences." When Sir John Moore, as President of a Court, was sued for words spoken by him, declaring the charge to be groundless and malicious, Sir James Mansfield, who was the presiding Judge at the trial of the cause, held that the words complained of formed part[2] of the Judgment of acquittal, and therefore that no action could be maintained against the Defendant.

34. So, also, these Courts have certain Statutory, though

[1] Scott *v.* Stansfeld, 3 Ex. (L. R.), p. 220.

[2] Jekyll *v.* Moore, 2 Bos. and Pul. (N S.), p. 342, and Dawkins *v.* Paulet, 9 B. and S., p. 770.

few of those powers which are customary or incident to the Common Law Tribunals. Having the power to fine and imprison, they are (I presume) Courts[1] of Record and of competent Jurisdiction for the trial of all matters of Fact or Law coming before them.[2] They are neither Common Law nor Civil Law Tribunals,[3] but regulated by a practice of their own, to which the legal maxim "Cursus curiæ est lex curiæ" applies. They are open[4] Courts to all persons other than the Witnesses (who are usually ordered to withdraw),[5] and with the discretion which every Court may exercise of excluding the Public when necessity requires it. "In many cases," said Lord Tenterden, "it will be impossible that a proceeding should be conducted with due order and solemnity, and with the effect that Justice demands, if the presiding Officer has not the control of the proceedings, and the power of admission or exclusion, according to his own discretion."[6]

35. It is within the competency of the Court, before entering upon the trial,[7] to postpone it upon a proper application being made, and cause shown on affidavit. In the Civil administration of Justice this arises where it is shown that without fault in the applicant a material Witness is absent, or unable to attend, but may be secured if the hearing of the case be fixed for a later and definite period. Delay at the instance of the Prosecutor entails other considerations, the Prisoner being in custody, than where the application is made on the Prisoner's behalf.[8] The case having begun, the adjournment may be made for the illness of a[9] member of the Court, or of the Prisoner; but a post-

[1] Lord Holt, Grenville *v.* Coll. of Physicians, p. 389 *sup.*

[2] Rex. *v.* Suddis, 1 East. Rep., p. 306; Miller *v.* Knox, 4 Bing. N. C., p. 576.

[3] The Duke wrote to the same effect, but referring (I think) to the Portuguese system. Vol. iv. Gur. Desp., p. 54.

[4] Vol. I. p. 160. A Witness remaining after an order to withdraw would be guilty of Contempt, but he must be heard as Witness. Vol. ii. Tay. Evid., p. 1210.

[5] To prevent collusive evidence, where the Witnesses come from the same Company or Regiment. When Sullivan wrote, no party could examine his *own* Witnesses, "lest it should lead to answers concerted for establishing guilt or innocence" (see p. 35.)

[6] Garnett, *v.* Ferrand, 6 B. & Cr., p. 628.

[7] Vol. ii. Tay. Evid., p. 1194. The temporary illness or insanity of a Witness is a good cause.

[8] Vol. ii. M'Ar., pp. 27-366; Simmons, p. 209.

[9] In America the adjournment of Court for illness of members sanctioned, 1842, Legare, Vol. iv. Attorney General's Opinions, p. 18.

ponement to get up evidence which ought to have been ready at the opening would not be regular. As the time of sitting is Statutory,[1] it must be strictly noted on each day, to secure the regularity of their proceedings.

36. It is in the exercise of a similar power,—that of regulating their own proceedings,—that barristers and attorneys of the Superior Courts at Westminster are excluded from practice before Courts-martial. "If," said the late Sir Willoughby Gordon,[2] "this established principle and usage of Courts-martial be departed from in favour of an Officer, it must be equally extended to the Non-commissioned Officers and Privates throughout every part of Her Majesty's possessions abroad and at home." "This," wrote the author [3] of the 'Essay on Military Law' (himself the Judge Advocate of North Britain), "is a most wise and important regulation; nor can anything tend more to secure the equity and wisdom of their decisions; for lawyers being in general as utterly ignorant of Military Law as the members of Courts-martial are of Civil Jurisprudence and the forms of ordinary Courts, so nothing could result from the collision of such jarring and contradictory Judgments but inextricable embarrassment, or rash, ill-founded, and illegal decisions."

37. Neither is this rule without analogy in the Common Law, where Magistrates have excluded practitioners from their Courts, and for the same reasons that have induced Military Tribunals to do so. The question raised in Collier *v.* Hicks[4] was, whether any one was entitled as a matter of right to attend on the part of a Prisoner and take part in the proceedings as an advocate, by expounding the Law and examining the Witnesses. "This was," said Lord Tenterden, "undoubtedly an open Court, and the public had a right to be present as in other Courts; but whether *any* persons, and *who*, shall be allowed to take part in the proceedings must depend on the discretion of the Magistrates, who, like other Judges, must have the power to regulate the proceedings of their own Courts. Any person, whether he be a professional man or not, may attend as a friend, may take notes, may

[1] See Mutiny Act, 1689, and 160 Art. of War, 1872.
[2] Memo. of 1846, Court-martial Inquiry, 1869, p. 247.
[3] Tytler, p. 250.
[4] B. and Adol., p. 668, and see 34 & 35 Vic. c. 97, sec. 6.

quietly make suggestions and give advice; but no one can demand to take part in the proceedings as an advocate contrary to the regulations of the Court. It may be said that a denial of this right will be a hardship on the parties. I cannot accede to that opinion: on the contrary, I think it may be for the benefit of the parties that such a right should not be admitted. If the informer may as a matter of right demand that a professional advocate shall be heard for him, the accused must have the same right. The consequence would be that the parties would in most cases be put to a heavy and grievous expense."

38. A Military Court has no power of awarding damages [1] or legal costs, and therefore no encouragement ought to be given to any persons to incur them. Moreover, if any Court ought to be entirely self-dependent and able to exercise its functions on the spur of the moment, without instruction or advice *ab ultra*, it should surely be that Court which, from the necessities of the case, may be summoned at any moment, in the field or in quarters, in any part of the world, and to adjudicate upon any offence—Civil, Criminal, or Military—under ordinary or Martial Law. Once train the Officers of the Army to the belief that they are incompetent to discharge Court-martial duties, and the Courts themselves ought then to be suppressed altogether, and their Jurisdiction handed over to Camp or Cantonment Magistrates.

39. The Court being formed, its proceedings are protected from disorderly interruption. By the Articles of 1666,[2] the use of menacing words or gestures was punishable with death, and by those of 1872 with such punishment as the Court should think fit. The Articles of 1717 are silent on the subject, but those of 1748 [3] gave a discretionary power of punishment for words or threats, disorder or riot. This punishment could, it is presumed be inflicted by Court-martial upon those only who are subject to Military Law; and the present Articles of War direct the punishment of Civilians by the Common Law Tribunals.[4] In 1811, when the acting Judge Advocate applied to the Judge

[1] Vol. ii. M'Ar., p. 220. As to a Naval Court, 17 & 18 Vic. c. 104, sec. 263.
[2] Sec. 13, Art. 10. [3] Sec. 15, Art. 17. [4] Art. 161 of 1872.

Advocate General (Mr. M. Sutton) for his advice as to the means which should be used to protect the Court from insult, "the only reply that he could return" was that it was the duty of the Court "to take care that their proceedings were not interrupted, and, if no other measures were left them for the protection of order, that they must resort to force: they must commit any military man to the custody of the Provost, and send any other offending individual before a Magistrate for committal and subsequent indictment by the Judge Advocate."[1]

40. The publication of its proceedings during the sitting is also within the control of the Court. In General Murray's case, the Witnesses being ordered for examination separately and apart from each other, the Court appealed to the Secretary at War, showing that this order was defeated by the retail of the evidence in the daily prints, and Lord Kenyon[2] advised the Crown thus: "I think it will be prudent for the President of the Court-martial to express to the audience to-morrow the opinion the Court entertains of the bad consequence of those publications, and notice in writing should be immediately given to the publishers of the several papers that they must not persist in publishing an account of what passes, and in case they shall continue to publish after this caution, I think it will be proper to proceed criminally in the Court of Queen's Bench."

41. It is essential that the Prisoner should be present in Court throughout the hearing of the Case against him, it being a rule of the Law of England that no one should be tried for life or limb except in the presence of his accusers. Further, that the charges against him should be clear and definite, with such dates and circumstances that the accused may know what act or word he has to answer for, and what crime to explain away or extenuate. In Military, possibly more than in Civil, Law, intention[3] is the essence of crime, and though a vicious will be no crime in the Civil, it may (by vicious words, and without overt acts) soon become one in the Military Code.

42. The President should therefore see that the charges are

[1] 19 H. D. (O. S.), p. 96. [2] Vol. I. p. 516. [3] Adye, pp. 208-211.

clear and intelligible, that the Prisoner has been furnished with them and with the names of the Witnesses, and such other information preceding the trial as the customs of the Service and the Queen's Regulations entitle him to. Amendments of charges during a trial are not to be encouraged, nor can they be often needed, for the Court of Queen's Bench does not expect the same legal exactness in a Court-martial charge as in an indictment. No amendment in an indictment should ever be made at Law where the Defendant can be thereby prejudiced in his defence *on the merits*,[1] nor should any such amendment be made to a Court-martial charge.

43. "Almost all crimes are simple," said the late Deputy Judge Advocate General, speaking as a witness before the Court-martial Commissioners in 1868;[2] "but Military crimes are especially simple." Therefore no elaborate system of pleading is needed; but under any circumstances, whether Guilty or Not Guilty be pleaded (the Defendant standing mute being equivalent to "Not Guilty"), the Court must hear and record the evidence (with the Prisoner's defence, if any), for the information of the Convening and Confirming Officer.[3]

44. But if the Defendant pleads "Not Guilty," he may, under that plea, show any valid objection that would avail for his defence; as, the Statute of Limitations,[4]—condonation of the offence,—that he is not amenable to the Court, either in regard to its constitution or to his *status* as a Civilian,—or to his crime as not cognisable by a Military Tribunal.

45. One plea or objection on behalf of the Prisoner would appear to call for some special remark, viz., that made under the 14th Section of the Mutiny Act, which is founded upon the old legal maxim, "Nemo debet pro una et eadem causa bis vexari." In America, it would seem, that a second, or new

[1] Reg. *v.* Sturge, 3 E. and B., p. 734. [2] 2nd Rep., p. 12.

[3] So also in America, evidence, though defendant pleads guilty, should be given, 1834. Butler, Vol. ii. Attorney General's Opinions, p. 637.

[4] In England (by Sir James Wallace in 1781) and in America it has been laid down that the Court-martial has *no* jurisdiction after this limitation has expired (1820, Wirt, Vol. i. Attorney General's Opinions, p. 383; 1853, Cushing, Vol. vi. ib., p. 239, and that the objection cannot be waived by Prisoner, *ib.*) If proceedings are instituted before, but then adjourned and tried after the period of limitation, they are valid, 1854, Vol. vi. ib. p. 507.

trial may take place with the assent of the Prisoner,[1] but the first trial referred to in the Act must—judging from the analogy of the Common Law—be one that was carried through to Sentence and Confirmation. "The only pleas," said Chief Justice Erle,[2] "known to the Law, founded upon a former trial, are pleas of a former conviction, or a former acquittal for the same offence; but if the former trial has been abortive, without a verdict—there has been neither a conviction nor an acquittal, and the plea could not be proved,—that which would be a matter of plea to a fresh indictment would be a ground of error upon a second trial on the same indictment. As far as relates to the former abortive trial, nothing which then took place could be ground of error on the second trial on the same indictment, unless it would have been a bar, by way of plea, to a new indictment for the same offence." The offence must also be substantially the same; and as Court-martial proceedings are not guarded by definite pleadings,[3] nor is the Record so accurate an evidence as that of a Criminal Court, to determine the identity of the crime, the Court must act with caution, if the facts bear a close resemblance to those detailed in the former trial. If the former trial was stopped by failure of members, the Prisoner might be brought to trial again;[4] but if the Court were dissolved by order of the Crown, that would possibly be held to be equivalent to the entry of a *Nolle prosequi*, or a condonation equivalent to a former acquittal of the Prisoner.

46. But though the Court be formed, and seised of the legal controversy raised by the charge and plea thereto, no doubt can (I apprehend) exist, that the Tribunal may be dissolved at any time, and the Prisoner released or remitted to custody,

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[1] These points have been ruled in America:—

(1) That a second trial may be had on the Prisoner's own motion. 1818, Wirt, Vol. i. Opinions, p. 233.

(2) That a plea of *autres foits acquit* is the privilege of the accused, which he may waive. 1818, Wirt, Vol. i. Attorney-General, p. 233. (In a Civil Court, see 1842, Legare, Vol. iii. ib., p. 749).

(3) That a plea of former arrest and discharge is bad. 1819, Wirt, Vol. i. p. 294.

[2] Winsor *v.* the Queen, 7 B. and S., p. 500.

[3] See the cases decided in the American Courts cited, Benet, p. 113.

[4] Ib., or withdrawal of the charge? p. 119.

by order of the Crown—if not of the Convening Authority. In all Criminal matters before a Civil Court of Judicature, the power of the Crown to enter a *Nolle prosequi*, and thereby to stay proceedings, is undisputed.[1] Though whether the Prisoner may or may not be tried again for the same offence, has not been so absolutely determined. To set a Military Court in motion without the power to stay its proceedings, until, upon completion, they come to the Convening Authority to disallow, would be futile. Here, as in America,[2] this power would be exercised at any time after the Court was formed, and before its proceedings had terminated—if Justice required it.

47. A coercive power to secure the attendance of Witnesses before a Court-martial was first introduced into the Mutiny Act of 1800[3]—being taken from the Irish Act, at the instance of Sir Charles Gould, then Judge Advocate General. The Witnesses are to be summoned by the Judge Advocate to a General, by the President to other Courts, and are liable to attachment in the Queen's Bench, upon complaint of non-attendance, in like manner as any Witness neglecting to attend a trial in any Criminal proceeding in that Court. Protection from arrest was also given to Witnesses in going and returning from a Court-martial, in like manner as Witnesses attending any of the Courts of Law are privileged. These provisions continue in the Military Code of 1872.[4]

48. Where a proposed Witness is in legal custody of a Civil or Criminal Court, such a summons as that adverted to in the last paragraph, would not avail. A Military Prisoner can be brought up by order of the Military Authorities. A Prisoner of War can only be brought up under orders of the Secretary of State,[5] or one for high treason, with the sanction of the Attorney-General.[6] In ordinary Civil or Criminal custody, in England, resort must be had to one of the Superior Courts for a Writ of *Habeas Corpus* under the 43 Geo. III., c. 140, an

[1] The Queen *v.* Allen, 1 B. and S., p. 855.
[2] Benet, p. 107, but see Sec. 100 Mutiny Act, 1872.
[3] 39 & 40 Geo. III. c. 27, sec. 12; Book (724), p. 123; and see Sullivan, p. 65.
[4] Mutiny Act, sec. 13. [5] Furly *v.* Newnham, 2 Dougl. Rep., p. 419.
[6] Langston *v.* Cotton, Peake's A. C., p. 21.

Act which was passed at the instance of Mr. Justice Laurence, towards the close of the Session in 1803,[1] and remains unrepealed.

49. But though the Witnesses were before the Court, it had no coercive power either to compel them to be sworn, or, when sworn, to give their testimony. "It is strange," said Sir James Mansfield, in Moore *v.* Bastard,[2] "that Courts-martial should think themselves authorized to commit persons for perjury or other offences than those upon which they had themselves the power of deciding and punishing; for it had been again and again decided" (as the Defendant's Counsel stated in Warden *v.* Bailey),[3] "that though Acts of Parliament give power to Courts-martial to compel the attendance of Witnesses, yet, when they do attend the Court, cannot compel them to speak or commit them for a contempt."

This defect continued till the year 1830, when, by amending the 15th Section of the Mutiny Act,[4] Witnesses who refused to be sworn, or, being sworn, to give evidence, or to answer all such questions as the Court might legally demand of them, were rendered (as they continue to be) liable to attachment in the Superior Courts.

50. The testimony that is to be received against the Prisoner must be given under the sanction of an oath. This was provided by the Articles of 1666,[5] which authorized the Judge Advocate "to send for Witnesses, and to administer an oath, in order to the examination and trial of all offences." The Articles of 1672 were silent on this subject; but those of 1717[6] directed "that all Witnesses should be examined upon oath." In the Articles of 1748, and down to 1805, the oaths were imposed only in cases before General Courts; but in the year 1805[7] (against the advice of many General Officers, including the Duke of Wellington), Parliament for the first time imposed oaths upon the Judges and Witnesses in Regimental Courts.[8]

51. The punishment for Perjury should have been left with

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[1] Book I. p. 155. [2] Vol. ii. M'Ar. C. M., p. 199. [3] 4 Taunt. Rep., p. 76.
[4] 11 Geo. IV. c. 7. [5] Sect. 3, Art. 5. [6] Art. 22.
[7] 45 Geo. III. c. 16 sec. 17, and 47 Ann. Reg., p. 54. [8] Vol. II. p. 662.

the Civil Court ("the oath[1] being taken in a judicial proceeding before a competent Jurisdiction, and material to the issue"); but, to retain the power of punishment over the Soldier in the hands of the Military Tribunals, Perjury—when committed—was dealt with under the Mutiny Act as an "immorality,[2] misbehaviour, or neglect of duty," and visited with corporal punishment by sentence of a General Court-martial. However, in 1809, any one taking a false oath under the Act was declared—by the 118th Section[3]—punishable on conviction, for wilful and corrupt Perjury; which continues to be the present law.[4]

52. The manner in which the Witness gives his evidence is by *vivâ voce* examination, conducted through the President; who, like a Judge at Nisi Prius, exercises, with the concurrence of the other Members, a legal discretion in case of controversy as to the questions that shall or shall not be put to and answered by the Witness.[5]

In earlier times the evidence was in many cases (civil rather than criminal) taken by affidavit, sworn before the Judge Advocate General; and by the American Code at the present day, as in the Portuguese Code during the Peninsular War,[6] in the trial of cases not capital, the deposition of Witnesses not in the Army may, and might, be taken before some Justice of the Peace and used in evidence, provided the Prosecutor and person accused be present at the taking of the same, or duly notified thereof.[7] During the Peninsular War the suggestion to take depositions or affidavits was made by the Duke of Wellington, and the Cabinet went so far as to frame clauses to carry it into effect, but other than in his Despatches I find no trace of these papers.[8]

53. No doubt each Witness gives his evidence under the same conditions that would attach to him if examined in any other Court of competent Jurisdiction. He would not in any Court be bound to criminate himself; nor would he be liable, at the

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[1] Vol. I. p. 523, and King *v.* Aylbil, 1 Ter. Rep., p. 69. [2] Vol. I. p. 523.
[3] 49 Geo. III. c. 12. [4] Sec. 96 of 1872. [5] Vol. ii. Tay. Evid., p. 1209.
[6] Vol. vi. Well. Desp., p. 354; and see Chap. IX., par. 21.
[7] 74th Art. of War, quoted by Col. Benet, p. 126; and Vol. ii. Tay. Evid., pp. 465-471. [8] Vol. vi. pp. 277, 354, 359.

instance of a third party, to an action for slander or libel for anything that may have been said or written by him as a Witness.[1] His competency and credibility should also be tested by the same rules of evidence that prevail in the Superior Courts, whether dependent on the authority of the Judges of those Courts or of the Statute Law. It should never be forgotten that the object of the rules of evidence, like those of logic, is to facilitate the inquiry after truth. What is or is not evidence in each particular case must, however, be decided at the time by the presiding Judges.[2] The subject is one too large for discussion here; yet a few sentences from the work of an able legal writer may be of some practical utility.

54. "A fact must be established by the same evidence which is to be followed by a criminal or civil consequence. In either mode of procedure the following rules obtain:—that the proofs must be relevant to the issue,[3] that the best evidence which the

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[1] Dawkins *v.* Rokeby. [2] Vol. i. Tay. Evid., p. 34.

[3] Mr. Pitt Taylor, in his Work on Evidence (1872), lays down these four general rules, and the principles upon which each is to be supported:—

"1stly. (*a*) That the evidence must correspond with the allegations, but

"(*b*) The substance only of the issues need be proved.

"(*a*) As the main object of pleading is to apprise the parties of the specific question in issue, that object would be defeated if parties were permitted to prove facts essentially different from those pleaded.—(Vol. i. p. 214).

"(*b*) Allegations of number (as 5 horses or 1) and value (20*s.* or 20*d.*) are generally immaterial; but the name or nature of the property stolen or damaged, or of the person injured, is matter of essential description.—(Pp. 271, 275, 277).

"2ndly. That the evidence must be confined to the points in issue as selected by the parties in their pleadings, as those only on which they are mutually willing to rest the fate of the cause: any evidence in support of other facts would be obviously improper.—(P. 284). Collateral facts, incapable of affording any reasonable presumption as to the issue, are therefore excluded (p. 335); but evidence of the defendant's general good character is admissible in all prosecutions for felony or misdemeanor, though liable to be rebutted by the Crown.—(Pp. 361, 362).

"3rdly. That the burthen of proof lies on the party who substantially asserts the affirmative of the issue; that is (upon the assumption of innocence) on the prosecutor.—(Pp. 372, 378, 379).

"4thly. That the best evidence of which the case in its nature is susceptible should be presented.

"This rule is adopted to exclude fraud, which the withholding the best information from the Court would lead to; and where the evidence which is offered indicates the existence of more original sources of information, these must be first exhausted to let in other evidence. Hence the distinction of primary and secondary evidence."—(P. 397; and see Note on Evidence, Appendix I, *post.*).

nature of the case will admit of must be given, that secondary evidence will only be receivable where the best and most direct evidence cannot be had; that hearsay is not in general admissible as evidence, because the individual whose words are spoken was neither sworn nor cross-examined; that evidence made by a person since deceased, when against his own interest or made in the usual course of business, may be received." In criminal matters especially, "that our Law presumes in favour of the innocence of the accused; that it regards the evidence of accomplices with suspicion; that a confession,[1] whether judicial or extra judicial, is admissible provided it was voluntary, and must, if admissible at all, be received in its entirety; that a dying declaration may be received in evidence on a trial for homicide where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration."[2]

55. In any inquiry upon professional competency, the evidence of experienced Officers may, it is said, be admissible by the Court.[3] A Witness present at the scene of action should state the facts rather than his *opinion* upon them,[4] for *that* would be usurping the functions of the Court. The physical possibility of discharging a duty may in certain circumstances become a matter of fact rather than of opinion, but even so the conclusion from the facts which he proves will surely be as safely drawn by the Court as by the Witness. The opinions of Subordinate upon the conduct of Superior Officers should not be invited; nor would a Witness act unreasonably, if, in such an instance, he threw himself upon the protection of the Court.

56. A Witness may, on behalf of the Public and upon grounds of public policy, decline to make disclosures;[5] but these objec-

[1] So in Court-martial practice, Sull., p. 45. [2] Broom's Commentaries, p. 999.

[3] Vol. vi. M'Ar., pp. 134-155; Adye, p. 190; Tytler, p. 301. Bradley *v.* Arthur, 4 Bar. and Cr., p. 305; Vol. ii. Tay. Evid., p. 1227.

[4] In judging from acts or words, Mr. Baron Martin in this terse sentence lays down a great truth. "It is the rule of Common Law, as well as of common sense, to look at what is done, not what is said." Caine *v.* Coulton, 1 H. and Colt, p. 768.

[5] In the following dialogue, taken from the public prints, and which astonished some readers, the President, in my judgment, had the best of the legal argument:—

Extract from 'TIMES,' *Megæra Court-martial, 16th November*, 1871.

"Mr. Joseph Peters, foreman of boilermakers at Sheerness Dockyard, recalled

tions should be raised upon the definite responsibility of some person in authority.[1] All information in a Public Department is in the legal custody, not of the Clerk or Officer who by accidental employment holds such, but of the responsible head or chief. Obviously, therefore, nothing ought to be given out or removed from his department except by his order and direction, for otherwise the ordinary rules of law or rights of property would be violated. When such information is needed, the summons must be left with the responsible head or chief;[2] and he will, should not the public interests be damnified thereby, depute a subordinate to give the Court all the official information, documentary or otherwise, which is right.[3] State documents are not often produced, and therefore extracts or copies are receivable in evidence on the ground of public convenience.[4] In a recent case, extracts from the confidential reports[5] of the General's half-yearly inspection were submitted to the Court in favour of an Officer, where public policy would have forbidden the Secretary of State to disclose the report itself, referring—as it did—to many other persons than the accused.[6] It is perhaps scarcely necessary to say that the evidence must be given before the full Court, and that no individual members can be deputed to attend upon an absent Witness to take his evidence

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and examined by the Court.—'I was at Devonport Dockyard in 1864, when the boilers and engines of the Megæra were renewed.'

"(The Witness was here told by the President that he need state nothing that would tend to criminate himself.)

"*The Judge Advocate.*—'Or that, as an Official of the Government, it would be impolitic, as concerns the Public Service, to state.'

"*The President.*—'I do not recognise anything of the kind. The Witness is sworn to speak the truth, the whole truth, as far as he knows it.'

"*The Judge Advocate.*—'I am only telling the Witness what is the law of the land.'

"*The President.*—'I do not believe it is the law of the land, nor anything like it.'"

[1] See Beatson *v.* Skene, 5 H. and N., p. 855, where Lord Herbert, as Secretary of State, came to the Court to assert this principle. In Dickson *v.* Wilton, 1 Fos. and Fin., p. 424, definite instructions were given.

[2] Legatt *v.* Tollerrey, 14 East. Rep., p. 303; Austin *v.* Evans, 2 Man. and Gr., p. 431; Phipps *v.* Drew, 3 Ell. and Bla., p. 437.

[3] Bentall *v.* Sydney, 10 Ad. and Ell., p. 170; Beatson *v.* Skene, 5 H. and N., p. 855. [4] Eyre *v.* Palsgrave, 2 Camp. Rep., p. 606; Star Eve., pp. 269-270.

[5] Captain Lake's Court-martial and acquittal, Jan. 1872.

[6] Horne *v.* Bentinck, 2 Bro. and Bing., p. 162.

or deposition.[1] In America it has been ruled that no member absent from Court during the examination of Witnesses can take part in the Finding or Sentence.[2]

57. The Statutory amendments to the Law have been directed to the object of facilitating the reception of Evidence—leaving to the Court a wider discretion in determining the value (if any) to be put upon it. Persons theretofore excluded from interest or moral turpitude may now[3] be heard as Witnesses. Husbands or wives, except in Criminal matters, may give evidence of facts for or against the interest of either;[4] but Prisoners jointly indicted may not testify the one for the other until one or other pleads or is found guilty.[5] Documents are to be proved without the originals on production by copies authenticated under official seal or certificate.[6] Deeds by proof of handwriting, and handwriting by comparing the disputed with the admitted or genuine writing.[7] The rule that a party shall not impeach the credit of his own Witness by evidence of general bad character is established; but he is allowed to contradict particular statements, inconsistent with facts as he has previously stated them.[8]

58. So soon as the Prosecution has closed, it is the duty of the Court to hear all that the Prisoner has to prove by Witnesses or to say in his defence. "The Laws of God and man," said Justice Fortescue, in Dr. Bentley's case,[9] "both give the party an opportunity to make his defence."[10] "It is to be found at the head of our Criminal Code," said Lord Kenyon,[11] "that every man ought to have an opportunity of being heard before he is condemned." "No proposition can be more clearly established," said the late Baron Parke,[12] "than that a man cannot incur the

[1] Adye, p. 200.

[2] 1831, Berrier, Vol. ii. Attorney General's Opinions, p. 416; 1842, Legare, Vol. iv. ib., p. 7, *sed query*; 1855, Cushing, Vol. vii. ib., p. 102.

[3] 6 & 7 Vic. c. 85; 14 & 15 Vic. c. 99, sec. 2. [4] 16 & 17 Vic. c. 83, sec. 1.

[5] Reg. *v.* King, 1 Cox Cr. C., p. 232. [6] 14 & 15 Vic. c. 99.

[7] 28 Vic. c. 18, secs. 7 and 8. [8] Ib., sec. 3. [9] 1 Str., p. 567.

[10] "I remember to have heard it observed by a very learned man," continued the Judge, "that even God himself did not pass sentence on Adam before he was called upon to make his defence. 'Adam (says God) where art thou? hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same was put to Eve also." [11] King *v.* Gaskin, 8 Ter. Rep., p. 210.

[12] Bonaker *v.* Evans, 16 Q. B. Rep., p. 171.

loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him." And, lastly, as was laid down in the House of Lords,[1] "It is the very essence of justice that every person should be heard before judgment is given against him." The Courts all firmly adhere to that great principle of justice, that in every judicial proceeding, "Qui aliquid statuerit parte inauditâ alterâ, æquum licet statuerit, non æquus fuerit."

59. But in subordination to this principle, the Court, it must be remembered, is one of "discipline and honour." If, however, the necessity of his defence obliges the Prisoner to show that the orders or acts of his Superior were erroneous, he must be permitted to do so, leaving it for the Court to judge how far such error (if proved) may justify his disobedience.[2] So, also, if the motives of the accuser fairly present themselves for consideration in determining the issue, these may be criticised by the Prisoner. The Court in such cases acts rather by way of caution than of interdict:[3] for though allowance must and ought to be made for any one striving to prove his innocence, yet this must be done lawfully, not maliciously; while prejudice would arise in the minds of honourable men (of which the Prisoner should be warned) against any one evading the issue, or shifting it by fixing offence or crime on others, not present to defend themselves.[4]

60. The Defence closed—the Evidence summed up—the Prisoner removed and the Court cleared[5]—the duty of the President is to collect the votes or suffrages of all the members —supernumerary or otherwise; each one voting as a matter of Military duty,[6] the breach of which would render him liable

[1] Queen *v.* Saddlers' Company, 10 H. of L. C., p. 423, and Note in 3 Fos. and Fin., p. 551.

[2] Bruce cites with approval the Roman Law that visited a successful disobedient act with the punishment of death, p. 230.

[3] Sir John Becket in Dawson's Case, cited by Simmons, p. 229. If the Prisoner was restricted in his defence, revision may be ordered, ib. p. 362.

[4] Tytler, p. 301.

[5] In America it has been laid down that no *evidence* ought to be received after the Court is cleared for deliberation. 1840, Gilpin, Vol. iii. A. G., p. 545.

[6] Simmons, p. 249.

to Court-martial punishment.[1] It has been a fundamental principle in all Military Codes that, to secure the freedom of Junior Officers, the votes should be taken from the youngest up to the eldest member of the Court. In no other way could this freedom be secured; for the service of all Officers upon a Court-martial is, as we have seen, a Military duty discharged under the Mutiny Act, in subordination to the President appointed by the Convening Officer. The votes of the Juniors, unless given before those of their Superiors, might place them in direct conflict with their declared opinions. The decision of the Court is also to be governed by a plurality of votes, with a Statutory quorum in case of Capital crimes. The Articles of 1672,[2] and those in force during the reign of Queen Anne, provided that the President, in case of an equality, should have the casting vote; but no such right was conferred by the Articles of 1717, nor has it been given by any later Code. A Statutory quorum of members must, of course, be secured, to make the decision of the Court valid; and should the votes be equal, the Prisoner is acquitted.[3]

61. It appears to be well settled that the Court, in adjudicating upon the charges, have the whole case[4] between the Prosecutor, the Witnesses, and the Prisoner before them; and are bound, where occasion requires them to do so, to remark on the conduct of these parties, in terms of censure or approval, in giving their Sentence. The non-interference of the Civil[5] Courts is founded upon the consideration that the Military Tribunals have complete seizin of the whole controversy, and both can and will do fair and impartial justice between the accused and his several accusers. If, from any pusillanimous feeling, they fail in their duty in this respect, the interests of the Service are made to suffer in one of the most vital principles of Military Justice. The reputation and honour of the accused are often in the hands of his Judges; and if they shrink from doing Justice to an innocent man against

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[1] See the trial of an officer in 1839 for refusing to vote, referred to in Captain Hale's Evidence before the Court-martial Commissioners, 1868, 2 Rept., p. 65.

[2] Art. 60. [3] Vol. i. M'Ar. pp. 259, 320, 436; Vol. ii. pp. 273, 371.

[4] Vol. ii. M'Ar., pp. 204, 333-337; Simmons, p. 252. Chap. VII., par. 212.

[5] Sutton *v.* Johnstone, Jekyll *v.* Moore, and other cases.

whom dishonour may be *imputed*, it may by their silence be *inflicted*.

62. Upon the term "honourable," as used in an acquittal, let the words of the Duke of Wellington be noted. "It is difficult and needless at present to define in what cases an "honourable" acquittal is peculiarly applicable; but it must appear to all persons to be objectionable in a case in which any part of the transaction is disgraceful to the character of the party under trial.[1] A sentence of honourable acquittal should be considered by the Officers and Soldiers of the Army as a subject of exultation, but no man can exult in the termination of any transaction a part of which has been disgraceful to him; and though such a transaction may be terminated by an *honourable* acquittal by a Court-martial, it cannot be mentioned to the party without offence, or without exciting feelings of disgust in others. These are not the feelings which ought to be excited by the recollection and mention of a sentence of honourable acquittal."[2]

63. The members of the Court, as discharging the double functions of Jury and Judge, have to decide on two distinct and separate matters. The first is, to find as a Jury whether, according to the evidence, the Prisoner is or is not "Guilty" on each of the several charges upon which he has been arraigned. In the ordinary rule of the Common Law, the Verdict can only so far affect the Prisoner as it relates to and covers the issue raised by the pleadings: thus, if charged with Murder, a verdict that he had committed Forgery would be voidable.[3] The Verdict might, however, be general or special; that is, either definite on the issue, or special by the statement of an alternative. Thus, where a Jury found a man "Not Guilty" of Murder, they were not bound to inquire whether he was "Guilty of Manslaughter;" but they might do so: for the killing was the substance, and the malice but a circumstance,—a variance as to which did not invalidate the verdict.[4] The

[1] The affray in which the Officer's conduct was under notice took place in a brothel in Lisbon. See another case of a drunken riot at Coimbra, vol. vi. p. 371, and of an Officer charged with making false accusations, vol. vii. p. 123.

[2] Vol. iii. p. 547. [3] Vol. i. Hawk. P. C., Bk. I. ch. x. sec. 6.

[4] Vol. ii. Hawk. P. C., Bk. ii. ch. xlvii. sec. 4.

Criminal Law has been amended in this direction; for a Prisoner indicted for Felony or a Misdemeanour, may be found not "Guilty," but "Guilty of an attempt" to commit the same, and punished for such attempt: so one indicted for Robbery may be convicted of an assault with attempt to rob. Again, if tried for a Misdemeanour, no acquittal shall be given because the facts prove a Felony. The circumstances in all these cases are substantially the same; and though the crime—as the result of legal enactment—may vary, as each case may be ruled to come under one or other class or category of offences, the Prisoner is really not prejudiced on the merits of the case which he has to answer for, but the administration of Criminal Justice is improved.[1]

64. This principle is not unknown in Military Law,[2] and is found embodied in Article 43 of 1872. It appears, however, to be more practised in the American Code; and various instances are given by a writer of authority,[3] where the principle is resorted to.

65. After the Finding, but not before, and assuming the affirmative to be found, then the Court, before deciding upon Sentence, as Judges,[4] may, for the "purpose of assisting their discretion in awarding punishment, receive evidence of former convictions against the Prisoner." The principle involved in this inquiry was first introduced into the Civil Criminal Code by Sir Robert Peel in 1827, when, under the 7 & 8 Geo. IV., c. 12, sec. 11, the Judges were permitted to receive evidence of a previous conviction (by certificate), and award severer punishment than the first committal of an offence would entail on the Prisoner. In 1829, the same principle was introduced into the Military Code by the 88th Article of War, which required (as did all later Articles till those of 1866)[5] that previous notice should be given to the Prisoner that such evidence would be tendered against him. No such notice to

[1] 14 & 15 Vic. c. 100, sec. 9. [2] Vol. ii. M'Ar., p. 220; Adye, p. 209.

[3] Benet on Military Law (1866), p. 152. In the Navy, see 29 & 30 Vic., c. 109, sec. 48.

[4] Where this evidence was given before the Finding, the Court had to revise their Sentence. Simmons, p. 365.

[5] Compare Art. 152 of 1865 with Art. 154 of 1866.

the Prisoner is now required by the Military Code; but the evidence is, of course, produced in his presence. The Court is restricted from awarding any other punishment "than may be legally awarded for the offence of which the Court-martial has convicted him."[1]

66. The Sentence, or award of punishment is, therefore, the second and final matter upon which a decision is to be given; and with the discretion entrusted to the Court by the Mutiny Act, no other Court of higher Criminal Jurisdiction will interfere. "It was intended by the Act," said Mr. Justice Laurence, "to give the Court-martial a discretionary power to apportion punishment according to the degree of guilt of the party convicted."[2] Nor can the Crown legally do so; for when, in 1748, it was proposed to prescribe the punishment of death by the Articles of War for desertion—the Mutiny Act having given to the Court-martial an alternative discretionary power of awarding other punishment—the Law Officers[3] (Lord Mansfield being one) advised the Crown that this discretion existed in the Court by statute, could not be taken from the Court by Articles of War, and that the alternative power (notwithstanding the terms in which the Articles of War might be framed) would remain in the Court.

67. A doubt has been suggested, whether those members who voted for an acquittal can legally assign any punishment, or vote on the Sentence. If they practically withdrew themselves from the case, and left the Prisoner in the hands of those members of the Court who took an adverse view of his conduct, they would, I apprehend, neglect their duty. Upon an innocent man, erroneously convicted by the Jury, the duty of the Judge would be to award punishment—though the most lenient which the Law sanctioned; thus, as far as possible, to mitigate the consequences of error, by saving life, or by lightening the Prisoner's sufferings, until, on appeal or pardon, it shall be altogether removed.[4]

68. By the first Mutiny Act, only one punishment—that of

[1] Art. 154 of 1872. [2] Rex. *v.* Suddis, *supra.* [3] Vol. I. p. 518.
[4] See Vol. i. M'Ar., p. 312; Vol. ii. pp. 312-374; Adye, pp. 212-217.

death—was named; but a discretion was given to award "such other punishment as the Court should see fit." This principle of sanctioning the infliction of capital punishment for offences of vastly different moral turpitude, has been continued and extended in the Military Code to the present time, but not without protest or adverse criticism.[1] "One of the greatest advantages of our English Law is, that not only the crimes themselves which it punishes, but the penalties which it inflicts, are ascertained and notorious—nothing is left to arbitrary discretion;"[2] and Sir W. Blackstone, who wrote thus, went on to regret that our Mutiny Act should have been so framed as to confer discretion so arbitrary upon Military Tribunals.

69. Whenever the punishment of death has been awarded, the method of execution has been determined by the Court. The death of an honourable, though misguided man, has usually been that of a Soldier, viz., by being shot; and few readers will forget the anguish of degradation which Major André expressed, when General Washington refused to alter his method of punishment from that of "hanging," to which he had been condemned and by which he was made to suffer. The death of a Criminal for base crimes—as desertion to the enemy, theft, or murder—has been that of hanging.[3]

70. The Corporal Punishments named in the Code of 1717 were the "Wooden Horse," "Pickets," "Running the Gauntlet,"[4] and such "other Corporal Punishment as" was then "practised in the Army for Military offences." These, and any corporal punishments, have altogether ceased, while an express limitation has been placed[5] in the power of a Court-martial, by declaring that no punishment shall be awarded which is contrary to the usages of English Law. The present methods of punishment have, however, been largely extended by enabling the Court to withdraw from the Soldier benefits—which in earlier periods he never had the power to gain, viz., increased pay and rewards for good conduct, which honest and faithful service entitles him to receive.

71. It has been pointed out at some length elsewhere,[6] that

[1] Vol. I. pp. 152-162. [2] Commentaries, Vol. i. pp. 414, 415.
[3] Vol. ii. M'Ar. p. 326. [4] Art. 36. [5] 1830, Art. 102; and 1872, Art. 145.
[6] Papers printed, 2nd Report Court-martial Commissioners, p. 248.

the Court has no power to award costs or pecuniary compensation to one acquitted by the Finding, or to order the payment of Defendant's Witnesses out of the Army Votes. Such a principle exists in the ordinary Criminal Code, and by a recent statute has been considerably increased.[1] The rule of the War Office, as established by Lord Palmerston, and since acted upon, is to allow the Defendant the expenses of Witnesses where he is acquitted of charges preferred against him by the Crown; but not to allow him even these expenses where he is found guilty, or where the charge has arisen out of the personal disputes of Officers.

72. The Finding and Sentence, drawn up and reduced into writing by the Judge Advocate or President, is signed by the latter as the Record of the Court. Where, in the Peninsula, the President of a Court-martial had omitted the formality of signing the Sentence which had been agreed to, and written out —upon his death—the Duke of Wellington ordered the Senior surviving Officer to re-assemble and sign the Record in the presence of the other members of the Court, annexing a minute that he had done so by the orders thereby conveyed to him.[2]

73. One essential distinction between the Finding of a Court-martial and the Verdict of a Jury is this: That, while in the one case it is essentially a secret proceeding, and the result not made known to the Prisoner till confirmed by the Convening Officer, in the other its validity depends upon its Publicity,—"It being always agreed," writes Hawkins,[3] "that in all Capital cases, the Jury must give their Verdict openly in Court, and cannot give a Privy Verdict." This rule in Military procedure dates, as we shall see, from William III.'s reign, and the reason perhaps, is not less forcible now than at the period of its adoption.

74. Having found a Sentence, and awarded a Punishment, either in the first instance, or on revision by direction from the Confirming Officer, the functions of the Court are terminated by the transmission of their Proceedings to him. In cases where the Finding and Sentence are returned to the Court for revision,

[1] 30 & 31 Vic. c. 35, secs. 2 and 5; and see Vol ii, Tay. Evid. p. 1077.
[2] Vol. vi. Desp., pp. 61 and 150. [3] Pleas of Crown, Chap. xlvii. sec. 2.

it may be questioned whether any members—though a legal quorum—other than all those who formed or awarded the prior Finding and Sentence, can legally alter or revise them. According to the ruling of the American lawyers,[1] such revision would be legal, but there would[2] be some risk in so altering a Finding and Sentence, or, indeed, in changing the nature of his punishment, to the prejudice of the Prisoner.

75. In the earlier[3] Military Codes, the power of life and death was in the hands of the General; but in later ones,[4] though prior to the Mutiny Act, the President was to pronounce the Sentence when given, and thereupon the Provost Marshal was to "have warrant to cause execution to be done according to the Sentence."

The Mutiny Act imposed no limitation upon the power of the Court; and hence the Sentence of Death might have been carried into execution at once, without the intervention of the Crown or Confirming Officer, had not William III., by his Articles of War and Warrants convening Courts-martial, declared "That no Sentence of Death be put in execution till an account be given to himself, in pursuance of the directions to that purpose in the 52nd Article of War, and his pleasure declared thereupon."[5] Such a limitation was expedient then, whatever it may be now; for—testing the matter by the early Court-martial Records—many lives have been spared by the intervention of a Superior Authority between the Court and the Prisoner. "A measure," wrote Tytler,[6] "of high expediency and good policy, which has often been exercised to the most beneficial ends."

76. At this, rather than at a later stage, it is (I apprehend) open to the Prisoner, excepting against the proceedings of the Court-martial, to make application to the Queen's Bench for a Writ either of Prohibition, of *Habeas Corpus*, or of *Certiorari*, to bring the matter in review before the Common Law Courts. For a Prohibition, the two principal grounds have been already

[1] 1855, Cushing, Vol. vii. Attorney General's Opinions, p. 339.
[2] Benét, pp. 167, 174.
[3] 1629, Art. 21, Chap. i. sec. 17. The same rule existed in the Navy, but the Court gives final judgment under the Navy Discipline Act. Forsyth's Cases, p. 193.
[4] 1672, Art. 60. [5] Vol. I. p. 503. [6] P. 339 (ed. 1810).

stated; but, in addition to these, others were urged, though without success, in Grant *v.* Gould,[1] to this effect:—1. That, contrary to the rules of the Common Law, evidence that ought to have been rejected was received, and that evidence which ought to have been received was rejected by the Court. 2. That the Prisoner was not, before his trial, specifically charged with the offence of which the Court found him "Guilty." Not admitting that a Court-martial was bound in all cases to adopt all the distinctions in the Law of Evidence that have been established in the Common Law Courts, or that the Queen's Bench should interfere for error which might be the subject of review or appeal, Lord Loughborough refused to grant a Prohibition. "It would," said the learned Judge, and his words were quoted with approval in 1833, by Lord Denman,[2] "be extremely absurd to expect the same precision in a charge brought before a Court-martial, as is required to support a conviction by a Justice of the Peace."

77. In Rex *v.* Suddis,[3] an attempt was made to induce the Queen's Bench to assume the functions of a Court of Error and reverse the decision of a Court-martial, upon two objections. The application was there made for a Writ of *Habeas Corpus* to discharge a Prisoner sentenced by a Court-martial, exercising Civil Jurisdiction in Gibraltar, to transportation:—1st, that the offence would not, according to the Law of England, bear such a punishment; and, 2ndly, That it did not appear that the Prisoner had been charged with the offence for which he was convicted. It was not, however, denied that the Court-martial had jurisdiction over, and a discretionary power to punish the party convicted, according to his degree of guilt, and therefore, the Court refused to interfere, "It was properly admitted," said Mr. Justice Grose, "that the Court had authority to try the offender and inflict punishment according to the nature and degree of the offence as regulated by the Law of the land. . . . We do not sit as a Court of Error. It is enough that we find such a Sentence pronounced by a Court of Competent Jurisdiction, to inquire into the offence, and with power to inflict such

[1] 2 H. B., p. 106. [2] *Re* Poe, 5 B. and Adol., p. 688. [3] East. Rep., p. 310.

a punishment. As to the rest, we must, therefore, presume "omnia rite acta."[1]

78. An application, at the instance of an Officer tried in India and cashiered under a Court-martial Sentence, was made in 1861[2] to the Queen's Bench, for a *Certiorari* to bring up (in order to quash) the record of his conviction by Court-martial, but without success. Admitting, if Jurisdiction had been assumed by a Court-martial over a Civilian, that the Queen's Bench should interfere, it was very doubtful whether that Court "should do so, unless the Civil rights"—as of life, liberty, or property—"were involved, or where the sentence affected only the Military status of the applicant." "We cannot," said Mr. Justice Crompton, "grant a *Certiorari*, unless we see for what purpose the record is sought to be brought before us. Here the object is only to quash it; *i.e.*, if the Court should appear to have exceeded its Jurisdiction." As the Sentence had been passed and confirmed in India upwards of three years previously to the application being made, the Court unanimously refused to interfere: "nothing but the Military status of the applicant was affected by the decision of the Court-martial; and therefore, in the exercise of their discretion," the Writ was refused.

79. No case appears to have arisen where the maxim "Consensus tollit errorem" has come under consideration of the Courts as applicable to Court-martial proceedings. In relation to the Criminal Jurisdiction of these Courts, as affecting life or limb, it can have no application whatever, and but little when a Soldier, acting without advice, waives or consents to any irregularity which, if insisted upon, might have freed him from peril. Other cases, however, may arise, as in the trial of Officers, when their conduct as such is under review, and their status only under adjudication, where the Prisoner (if competent) would gladly consent to accept the decision of the Court, reduced by accident (as a Jury may be) below the legal quorum. Under such circumstances, there seems to be no reason why here, as in America,[3] consent should not avail

[1] P. 315.

[2] *Re* Mansergh, 1 B. & S., p. 405.

[3] Waiver and consent to admit evidence given in the absence of the Prisoner and deposition of Witnesses taken abroad, 1824, Wirt, Vol. i. Attorney General's

in a Military as in a Civil Court;[1] for the pay and service of the Prisoner are matters within his legal competency to resign, without the adjudication of a legal tribunal.

Opinions, p. 706; Berrien, 1830, Vol. ii. Attorney General's Opinions, p. 344. So also, as to absence of a Member of the Court, 1855, Cushing, Vol. vii. Attorney General's Opinions, p. 102.

[1] Reg. *v.* Sullivan, 8 Ad. and Ell., ii. p. 831; Doe and Ashburnham *v.* Michael, 16 Q. B. Rep., p. 620; Pryme *v.* Titchmarsh, 10 Mee. and Wels., p. 605.

CHAPTER VII.

THE CONFIRMATION AND EXECUTION OF A COURT-MARTIAL SENTENCE.

1. WHATEVER measure of responsibility the Members of the Court may bear towards the Prisoner, there can be no doubt that an individual responsibility for the execution of an illegal Sentence rests with the Officer confirming the Finding and ordering the Sentence to be carried into execution.[1] Until the Finding be confirmed and the Sentence promulgated by the Confirming Authority, the proceedings amount to little more than a Report and opinion from a Court of Inquiry, both being inoperative, if not wholly void. It, therefore, behoves this Officer to act with care at all times, and with the best possible advice in such cases as present any features of doubt or difficulty.

2. And this is the more important from the circumstance that—as we have seen, and as mentioned by Hawkins[2]—there is no other appeal against the Finding and Sentence of these Courts, acting within the limits of their Jurisdiction. The decision of the Confirming Authority is final;[3] and, if wrong, irretrievable, other than as an appeal—not of right, but for mercy—to the person of the Sovereign (acting not through his Judges, but his political Ministers) may secure relief. The duty of the Confirming Officer is, therefore, one of the first importance in the Administration of Justice by Court-martial under the Military Code.

3. The Officer who has to discharge this duty ought to be

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[1] Haw. P. C., Bk. 1, Ch. x., secs. 4-9.

[2] Vol. ii., Bk. 2, Chap. iv., sec. 11. Chap. II., par. 12 *ante*.

[3] In American practice there is no appeal after revision. 1854, Cushing, Vol. vi. Attorney General's Opinions, p. 369.

thoroughly independent of the Members of the Court,[1] and he is generally the Military Heirarch by whom the Court (whose proceedings are under review) has been originally convened. Thus in the General Court summoned by the Crown or General in Chief Command, the Confirming Officer is the Sovereign or Commander-in-Chief: in the District the General who convened the Court is the Confirming Officer; and in the Regimental Court the Colonel of the Regiment is the Convening and also the Confirming Officer. Each, therefore, reviews the proceedings of his own Court; and, to assist him in this duty, he may obtain, either directly or through Superior Authority, the advice of the Judge Advocate General's office upon the "Record."

4. Formerly, in doubtful cases, of Capital or Penal Sentences, to aid the Confirming Officers, and to free them from all personal responsibility, the practice of the Crown was to refer the Record of the proceedings, to the decision of the Twelve Judges. This was done by Order of the Privy Council,[2] communicated to the Lord Chief Justice by one of the Secretaries of State; and their opinion collectively (or individually if they differed) was transmitted to the Crown through the same channel. Such was the practice till the close[3] of the last, and as early in this century Capital Punishments at home were seldom inflicted by Court-martial Sentences, the necessity for this advice became less urgent, though, unquestionably, the use of it added a great security to the Administration of Criminal Justice by Courts-martial. In the present day the Secretary of State would refer the Record to the Law Officers for Report,[4] and the confirmation would then probably be construed to be an Act of State; so that a *Nolle prosequi* could be entered by the Attorney General, should a Criminal Prosecution be thereafter instituted against the Confirming Officer.

5. The primary duty of the Confirming Officer, in his exami-

[1] Sir D. Ryder's Report of Sept., 1737, Vol. I. p. 515.

[2] See Sir James Eyre's Letter of July, 1796, Vol. I. p. 561.

[3] Captain Coffin's Case was referred in 1790. See Vol. ii. M'Ar., p. 291.

[4] This was done in March, 1866, when a Sentence of Capital Punishment was awarded by a Court-martial against a Prisoner.

nation of the Record, must be to satisfy himself on these several points:—

1st. (*a*) The Legal Constitution of the Court, and (*b*) its Jurisdiction over the Prisoner in respect to (*c*) the Crime for which he is sentenced,

and then the sufficiency of the Proceedings in regard

2ndly. To the Charge and the Evidence (admitted or rejected) in support thereof, and the agreement of the Finding with the Charge.

3rdly. To the Sentence and those provisions of the Statute Law which justify the punishment (if any) awarded against the Prisoner.

6. The original intention of interposing the authority of the Crown, as Confirming Officer before a Court-martial Sentence was carried into execution, was assuredly one of mercy. Military tribunals were (then, at any rate, if not now) prone to severity, and hence the attribute of mercy was secured to the criminal. The Reports of the Law Officers to George II., printed elsewhere,[1] show clearly this to have been their view. "Though it is provided that the Sentence of any General Court-martial shall not be put in execution until report be made of the whole proceedings to His Majesty or the General-Commanding-in-Chief and his directions are signified thereupon: yet we conceive that was only intended to give His Majesty an opportunity of extending His Royal Mercy by Pardon or Reprieve."[2] And again: "According to the principles of the Law of England, the King personally never gives judgment, especially of punishment; for mercy is his proper act."[3] Looking at it from a Soldier's point of view, "It is a glorious thing," said the late Sir John Macdonald, when Adjutant-General, "that the lowest individual in our ranks knows that his case will arrive at the Fountain Head; and that if injustice has been done him, it is perfectly sure to be looked into at Head Quarters," adding, in confirmation of this assertion, that "the Duke of Wellington constantly takes the Queen's pleasure

[1] Vol. I. pp. 510-520.

[2] Lords Hardwicke and Talbot (then L. O.), 1727, Vol. I. p. 510.

[3] Lord Hardwicke (then Sir P. Yorke), Vol. I. p. 514; and Chap. IV. par. 6.

about remitting certain portions of the punishment of Private Soldiers." [1]

7. I. For the discharge of the duty before referred to, the Confirming Officer has to act as a check upon the Court, and to satisfy himself on those points (*a*, *b*, and *c*) which have received our consideration in the last Chapter.[2] It is needless, therefore, to do more than refer to what has been already written elsewhere.

8. II. In the second inquiry, the object which must be kept in view is as to the Finding—to ascertain whether the Prisoner has had a fair trial upon the merits. Looking at the Record for this purpose, first, as the case was presented against the Prisoner, the charge should have been plain and explicit, the statements of the Prosecutor truthful, the evidence of the Witnesses full and impartial; and, secondly, as presented on behalf of the Prisoner, that all the evidence which he was entitled to from the adverse and other Witnesses was given, and his Defence heard and considered by the Court.

Accepting the Record as sufficient on these points, then the evidence must be sufficient to support—and the "Finding" must be consistent with—the charge. "If Justices of the Peace," wrote Hawkins, "on an indictment of trespass, arraign a man for felony, and condemn him to be executed, the Justices only are guilty of felony, and not the Officers who execute their Sentence; for the Justices had a Jurisdiction over the offence, and their proceedings were irregular and erroneous only, but not void." The Finding, therefore, must not be of a more serious offence than that alleged in the charge.

9. It may also be noticed that, should any recommendations or observations be made by the Court, these should not be embodied in their Finding, still less in their Sentence, but be placed, as a separate Memo., at the foot or end of their Record, or in a letter,[3] addressed to the Confirming Officer, that the

[1] Question 2470, Report on Army Expenditure, p. 850.
[2] Pars. 23-32. [3] Vol. v. Well. Desp., pp. 248, 261; 7 ib., p. 112.

proceedings may be confirmed, without thereby adopting these extra Judicial memoranda.

10. III. In the third inquiry, the rule of the Statute Law must be applied to the "Sentence," with a view of ascertaining whether the Punishment, as to its extent or nature for the crime or offence mentioned in the Charge and Finding, be within the limits prescribed by the Mutiny Act with regard to the Regular Army, and the Militia and Volunteer Acts with regard to the Auxiliary Forces; for as these Courts and their powers over life or limb are purely Statutory (which term extends to the Articles of War so far as they are *intra vires*), the Punishment awarded by the Sentence must be strictly consistent with these Statutory Powers.

11. Now, if the Record be not sufficient on these points, then the Confirming Authority, having himself no power to revise errors, may transmit the "Record" to the President, that the Court, on the reassembling of the Members, may, if they see fit, do so upon those points of their Finding or Sentence to which the Confirming Officer has directed their attention. But they can neither recall evidence nor alter the Record as originally transmitted to him. All that they can do is to supplement it by adding, first, the order for revision, and then a revised—or an adherence to their original—Finding or Sentence. In this manner informalities or irregularities apparent on the Record may be amended, and the Court may, on a review of the *Evidence*, return another "Finding," or of the *Law*, another "Sentence;" but no inherent defect—as want of Jurisdiction, for instance—can be cured by revision. In American practice the presence of the Prisoner is needed,[1] but, as in this country he is not present during the first, there is no reason why he should be so during the second deliberation. The revision is really an amendment of the Record upon error suggested by the Supreme Legal Authority of the Court.

12. Whenever, therefore, the Record is satisfactory to the Confirming Officer, his duty is, first, to "confirm" the Finding

[1] Benét, p. 170.

and Sentence, and, secondly, to give such directions as he sees fit for carrying the latter into execution; but whether he "approves" or not is immaterial, so far, at least, as the validity of the Sentence and future Punishment of the Prisoner are concerned.

13. Before dealing with the Execution, something remains to be written upon the "Sentence;" for the Crown may directly (or indirectly through the General) take one of three courses:—

1st. Pardon the Offender, or,
2nd. Mitigate the Punishment, or
3rd. Carry the full Sentence into effect.

Subjects that will be taken into consideration in the order in which they are thus presented.

14. But, as preliminary thereto, it must be noticed that the Sentence of a Court-martial involves no "forfeiture" of Civil Rights in like manner as Conviction or Attainder by a Common Law Tribunal for felony or treason would formerly have done. The Court of the Constable or Marshal wrought no such forfeiture or corruption of blood according to Lord Coke's authority;[1] for neither were the offences chargeable against the Prisoner cognizable at Common Law, nor was his trial according to the course of it by Indictment and Verdict of twelve Men.[2] Where, therefore, an Offender had been convicted of a Common Law Offence by a Court-martial exercising Civil Jurisdiction abroad, it was held that no forfeiture (other than any which the Mutiny Act might inflict) was entailed upon him.[3]

15. I. The Pardon to a Military Offender is, therefore, not given with the same form or solemn authentication as in Civil cases. If the Crown should think fit (at the instance of the Commander-in-Chief[4]) to pardon and to restore such a Person to his Military Status or Pay, it would be competently done by Royal Sign-Manual Warrant or by a notification in the 'London Gazette,' or if need be by recommissioning or reinstating him.

[1] 1 Inst. 13a and 391a; 4 Inst., p. 125.
[2] Vol. i. Hale, P. C., cap. 27, p. 354; and 2 Haw. P. C., p. 11.
[3] Bk. E, p. 481; G, p. 40. [4] Bk. F, p. 283.

Pardon, however, does not, *ipso facto*, restore the Offender to Office or Pay,[1] or indeed to Her Majesty's Service, if dismissed therefrom—but only remits the Punishment and consequences of the Sentence, with a claim more or less just, to be restored to Rank or Pay.[2] If granted to remit the consequences of an unjust or erroneous Judgment, which never should have been passed,[3] then, because the Prisoner merited a Pardon,[4] restoration might be claimed.

16. II. The mitigation, other than by simple remission of a part of the Punishment, must be done under Statutory Authority. George I., as already mentioned, was in the practice of remitting "Capital," and of substituting "Corporal" Punishment, but he was advised "that all Judgments that can legally be executed must be the Judgments of the Courts-martial," and that although "he might reprieve or pardon the offender by remitting the whole or any part of the Judgment, yet that he could not change the Sentence of Death into any other Corporal Punishment, because though a mitigation in favour of the Prisoner, yet it was a new and different Judgment which the law did not admit of."[5] Hence a power of substituting one for another Punishment was inserted, and is found in the Mutiny Act.[6]

17. But though this power was given in a section drawn by Lord Hardwicke, he appears to have been strongly opposed to its expediency. In his view "the change[7] would be attended rather with inconvenience than advantage to His Majesty's Service." It would, he feared, "make Courts-martial less careful and circumspect in their Judgments when they knew there was an opportunity to change the Punishment in the nature of an appeal from their Sentence." "This might prove mischievous, since it was impossible that His Majesty should have the same degree of evidence before him as they who

[1] In America the Sentence of Suspension does not deprive of Pay and Emoluments. 1853, Cushing, vol. vi. Attorney General's Opinions, p. 203.

[2] 2 Haw. P. C., Bk. 2, c. 57, sec. 54; G, p. 312.

[3] 2 H. P. C., Bk. 2, c. 50, sec. 18. [4] Case of Pardons, 6 Co. Rep. 14a.

[5] Lords Hardwicke and Talbot, Vol. I. p. 510. [6] Secs. 16, 20, 24 and 25.

[7] Vol. I. pp. 513, 514.

examined the Witnesses *vivâ voce* in open court." "The Court itself was not confined to give Judgment of death in all cases, but Death or such other Punishment as it shall inflict." Surely, therefore, "it will seem a little odd that where the Court, who had all the Witnesses and proofs before them, and had power to give Judgment of death, or for a lesser punishment, at their election, have upon the whole matter given Judgment of death, there should be another resort, not for mercy only (which is a proper power, essential and appropriate to the Royal Person) but for a new Judgment, without any opportunity of examining or hearing the same evidence." These words, though written one hundred and fifty years since, contain counsel not unworthy of the attention of those who have to exercise a power of which Lord Hardwicke thus deprecated the use.

18. III. The carrying out of the Sentence of Death can only be put in execution with the express sanction of the Crown here or of the Civil Governor in a Colony,[1] and in strict accordance with the Law. It "must be pursuant of and warranted by the Judgment: otherwise," wrote Hawkins,[2] "it is without authority, and consequently if the Sheriff behead a man where it is no part of the Sentence to cut off the head, he is guilty of felony." The Law of England never fails to protect any one; for the life, limb, and liberty of the Criminal, so far as he is entitled thereto, are as much within the care of the Law as those of the innocent.

19. The place of imprisonment is fixed by proper authority under the 139th Article of War, and must be such as the Law justifies. The removal of the Criminal from where he ought to be, to another part in the same prison where he ought not to be confined, may be an act of trespass against him. "There is no doubt," said the late Baron Alderson, "that if a gaoler chooses by force or threats of force to compel a Prisoner to move from one part of a prison to another (not the proper place of custody), that is properly the subject of an action of trespass, just as much as the putting an additional fetter upon the Prisoner, which by Law he is not entitled to do."[3] In Allen's case, his removal from

[1] Art. 123 of 1872. [2] Bk. I, c. 10, sec. 10.
[3] Cobbett *v.* Grey, 4 Exch. Cas., p. 743.

the Fort of Agra (where his life would have been sacrificed) to England, was the occasion of his immediate release, though the Sentence was imprisonment for Manslaughter,[1] justly imposed for a crime charged against him as Murder.

20. If the Sentence is for "imprisonment" only, then compulsory hard labour could not be inflicted,[2] nor could the Prisoner be subjected to the punishment of solitary confinement unless sentenced to it.[3] Penal Servitude is now used in lieu of the punishment of Transportation,[4] and bears the severest form of imprisonment which the Law sanctions. But all these punishments differ little, if at all, from those of the same nature or character which are inflicted by Civil Tribunals; and therefore I should be passing beyond the scope of this Work, if I entered upon them, for they are not matters peculiar to the Administration of Justice by Courts-martial. The Mutiny Act gives a discretion as to the selection of Prisons, and this is generally exercised by sending those who are to rejoin the Service to Military[5] and others to Civil Prisons.

21. It has been already noticed[6] that the Court has the seizin of the whole case, and that the conduct of all the parties appearing before them in the controversy is subject to such strictures as they may see fit to make. Those members of the Service whose conduct has been thus unfavourably adverted to, may be dealt with, under the disciplinary powers of the Crown, by reprimand, removal from the Service, or by substantive proceedings being instituted against them.

22. And as the Court may advert to the misconduct of others, so in like manner may their misconduct be brought under the direct notice of the Crown by the Confirming Officer. Thus, in the case of acquittal, where the Court refused to take the measures suggested by the Duke for the revision of their Sentence, he refused to confirm, and sent their Proceedings home to the Commander-in-Chief for censure. "The decision of the

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[1] 3 Ell. and Ell., p. 339.
[2] 28 & 29 Vic. c. 126, sec. 19; Queen *v.* Baker, 7 Adol. and Ell., p. 517.
[3] 7 Will. IV., and 1 Vic. c. 90, sec. 5.
[4] Bullock *v.* Dadds, 2 B. and Ald., p. 260; 20 & 21 Vic. c. 3.
[5] As to these, see Vol. I. p. 405. [6] Chap. VI. par. 61 *ante*.

Court seems so unaccountable and so little calculated to enforce the Rules of this Army and General Rules of the Service, which were the evident objects of this trial, that he has determined to bring the conduct of the members under the Commander-in-Chief's notice by the transmission of the Proceedings to England, with his observations with reference to them."[1]

23. Responsibility for the discipline of the Army rests not with the Officers who are the members of Courts-martial (an assumption of self-government which would render the Army supreme), but with the Crown and the General Officer appointed by the Crown to command it. Hence the Duke of Wellington in the Peninsula, and Sir Charles Napier in India,[2] refused to be always bound by such decisions or recommendations; for their duty as Generals being to uphold the discipline and efficiency of the Army, it was easy for them to see how both might be sacrificed by the irresponsible members of Military Tribunals.

24. The ultimate custodian[3] of the Records of General and District Courts is the Judge Advocate General in London, and it is his duty to furnish office copies to those entitled to demand them, at a reasonable price. The right to these copies was first given by the Mutiny Act of 1748,[4] "to any person tried by the same, at any time not sooner than three nor later than twelve months after the Sentence given, and whether such Sentence be approved or not." To carry this into effect, a direction was inserted in the Mutiny Act of 1750,[5] that every Acting Judge Advocate should send up the Proceedings with as much expedition as possible to the Judge Advocate General in London, to be kept and preserved in his office, *to the end* that the persons entitled thereto might obtain copies thereof, as provided for by the Act. In 1860 these provisions were transferred from the Mutiny Act to the Articles of War, where they now stand.[6] The Records of Regimental Courts are kept at the Regiment.

25. No doubt, if, for the purposes of Public Justice, production of these Records were needed, they would be produced

[1] Vol. vii. Gur. Desp., pp. 197-180; Vol. viii. pp. 53, 306. [2] Pp. 35, 111.
[3] *Re* Mansergh, 1 B. and S., p. 406. [4] 22 Geo. II. c. 5, sec. 9.
[5] 24 Geo. II. c. 6, sec. 8. [6] Arts. 157 and 158 of 1872.

under *Subpœna duces tecum* served on the Judge Advocate General, and in cases coming before the Courts he has testified by Affidavit of their contents. This is the view taken of this obligation in America, and there acted upon.[1]

As to the Army in India.

26. In this and the two preceding Chapters no particular reference has been made to the Administration of Justice by Courts-martial in India, thinking it better to reserve the whole subject for separate consideration at the close of this Chapter. I now, therefore, enter upon it (though briefly) with this preliminary remark, that, from the circumstance of the Indian Empire having been originally governed by the Company holding delegated authority from the Crown, a separate Military Establishment, as pertaining to India, has been there created. When, therefore, 'The Government of India Act' passed in 1858, the Crown found established at Fort William and Bengal a Commander-in-Chief for India, with powers over the whole Indian Army analogous to those held by the Commander-in-Chief here over the Home Army,[2] and at the two other presidencies of Fort St. George (Madras) and Bombay, Generals holding commands (subordinate to such Commander-in-Chief) over the troops in those Presidencies. As incident to this Military Establishment, there was the office of Judge Advocate General in each Presidency, and upon the Staff of each General an Officer serving as Adjutant General for the discipline of the Army, or of that part of it under his Command.

27. The Powers of the Crown, as relating to the Civil and Military Administration of India, were in the Governor General and Council at Fort William; and the Generals, both in Chief Command and in the two Presidencies, were to obey the orders and directions of the Governor General; they were appointed by the Court of the Company in England,[3] and were liable to be recalled by the same authority. The Act of 1858 only

[1] Production of Record in aid of Public Justice, 1865, Speed, Vol. ii. Attorney General's Opinions, p. 143. In Parliament, see Vol. I. p. 175, and Vol. II. p. 329.

[2] Chap. I., pars. 23, 24; and Chap. V. pars. 2–5.

[3] 53 Geo. III. c. 155, sec. 80.

transferred the powers of the Company to the Crown, but left the Military Establishments of India intact.

28. To each of these Generals a Royal Sign-Manual Warrant is issued annually, so soon as the Mutiny Act is passed, for convening Courts-martial under it. The powers common to each are as follows:—

1. To convene Courts-martial for the trial of any Officer or Soldier under the Command.
2. To confirm and then to carry out, or to suspend or mitigate the Sentence.
3. To appoint any Field Officer under the Command to convene and confirm Courts-martial, or to refer the same for confirmation.
4. To appoint Courts-martial for the trial of crimes under the 101st Section of the Mutiny Act, and to confirm and carry out the Sentence of the Court.
5. To appoint an Acting Judge Advocate at any Court-martial.

29. The Warrants differ from each other in these respects:—

1. As to the General of the Presidency,—That, in case an Officer has been sentenced to death, penal servitude, or dismissal, he *must*—or in any other case he *may*—refer the Proceedings to the decision of the Commander-in-Chief in India.

2. As to the Commander-in-Chief in India,—he may

(*a*) Exercise the powers of Confirming Officer in the cases (before mentioned) sent to him from the General of the Presidency, or

(*b*) Transmit these or any other Proceedings of a General Court-martial to the Judge Advocate General in London, for confirmation by the Sovereign.

The Commander-in-Chief or the General in Command of a Presidency could order a Sentence of Death[1] to be carried out without the sanction of the Governor General (given under the 123rd Article of War), unless the Sentence had been passed under the 101st Section of the Mutiny Act.

30. The discipline of the Army in India is therefore usually

[1] Sir Charles Yorke's Evidence before Indian Army Commissioners, 1859—Question 6696.

carried out under the authority of the Governor General as representing the Crown, and of the General Officers of the Crown in subordination to him. The Queen's Regulations, of course, remain in force, and such General Orders as are promulgated by the Commander-in-Chief are to be obeyed by the whole Army,[1] as those by the General of the Presidency are to be obeyed by the Forces under his Command. The aid of the Judge Advocate General's Department is at the disposal of the Military Authorities in India, as in England; and in all other respects, the method of proceeding is that which has been indicated in this and the previous Chapter of this Work.

[1] A volume published "By Authority" (as the title page states) was put forth in 1867 by Mr. "George E. Cochrane, late Assistant Military Secretary, India Office," with the title "Regulations applicable to the European Officers in India." It is, in fact, a valuable collection of miscellaneous information usefully collected for reference. See 202 H. D. (3), p. 99.

CHAPTER VIII.

MARTIAL LAW.[1]

1. FROM what has been already written, it will be seen that during the reign of Charles I. certain Royal Commissions were issued, authorizing the execution of Soldiers and citizens under a system of Judicature wholly unknown to the Common Law;[2] that Parliament, by the Petition of Right,[3] and the Judges by their advice in Council,[4] declared these Commissions to be illegal (other than in time of war, when the maxim "inter arma silent leges," from necessity, prevails), and that no similar Commission has since been issued by the Crown (other than by William III. to suppress the Rebellion in Ireland[5]); that during the reigns of Anne and George, the Mutiny Act was so amended in its Preamble as to leave the Crown[6] with such powers as it then had for the proclamation of Martial Law, either in time of war or in any place without the Realm; that the Articles of War have, since the reign of James II., authorized the destruction of property (of Rebels) by order of the Commander-in-Chief,[7] and that their operation, though limited with*in*, is unlimited with*out* the area of the United Kingdom or the British Isles as to the punishment of life or limb therein imposed.[8]

2. These are but slender grounds upon which to base the doctrine that the Crown has at the present time the power to issue

[1] On Military usurpation under the sanction of Legislation, see Mr. Dudley Field's argument in M'Cardle's case, Forsyth's Cases, pp. 491–550.

[2] Chap. II., pars. 3-7 *ante*. [3] Ib., par. 5. [4] Ib., par. 8.

[5] Ib., par. 9. The Bill of Rights (1 W. & M., Sess. 2, c. 2) declared the Commission for erecting the late Court of Commissioners for Ecclesiastical Causes, "and all other Commissions and Courts of the *like nature*, illegal and pernicious."

[6] Chap. III., par. 10.

[7] Chap. I., par. 15; Chap. II., par. 43; Chap. III., par. 31.

[8] Chap. III., par. 21.

Commissions identical with those put forth by Charles I. for the execution of Martial Law against any who as subjects are entitled to the protection of British Law. However, be this as it may, the materials for forming a correct decision upon a question so important are to be found rather elsewhere than here, the history of the use of troops in aid of[1] or to restore[2] the Civil Power in Great Britain and Ireland, and in all our Colonial Possessions,[3] during the last and present centuries being given in another Work from the official documents extant in the War or Council Office.

3. That much confusion is still existent upon the subject is not to be wondered at.[4] Indeed the action of Parliament and of the Crown, if such a suggestion may be made without offence, in some way contributes thereto. Year after year for many that have passed, an annual Vote has been sanctioned by Parliament for the "Administration" not of Military but "of Martial Law,"[5] and each succeeding Government has appointed, under patent from the Crown, a "Judge Martial" paid out of this Vote, who wholly disclaims having any other knowledge of "Martial Law" than such as every educated gentleman may possess, or anything whatever to do with any other than "Military Law."[6] "It is necessary," said Sir D. Dundas, as Judge Advocate General, in 1850, "to distinguish between Military and Martial Law. 'Military Law' is to be found in the Mutiny Act and Articles of War. Those, and those alone, it is which are properly called the Military Code, and by which the Land Forces of Her Majesty are regulated. 'Martial Law' is not a written law: it arises on a necessity, to be judged of by the Executive, and ceases the instant it can possibly be allowed to cease. 'Military Law' has to do *only* with the Land Forces mentioned in the 2nd Section of the Mutiny Act. 'Martial Law' comprises *all* persons, whether Civil or Military." It is clear, therefore, if anything be so, that Martial and Military Law are not the same, though out of this confusion of thought innocent lives may hereafter be, if already they have

[1] Vol. II., Chap. XVII. [2] Ib., Chap. XVIII. [3] Vol. I., Note I I, pp. 481-511.
[4] Chap. II., pars. 2-10 *ante*. [5] Vol. iii. Army Estimates.
[6] Evidence of Sir D. Dundas before Army Consolidation Commissioners, quoted Vol. II. p. 360, note [5].

not been sacrificed, by an indefinite and undefined responsibility resulting from it.

4. Whether Martial Law may be declared by the Crown, and under what given circumstances, is not a subject to be discussed here; for the Military Officer carrying out the orders of the Crown to supersede all Law by his own authority should not be involved, but should be absolutely free from *all* responsibility in their initiation. Given a Proclamation of Martial Law, issued by the Crown under the advice of Responsible Ministers, his duty should be to carry the same into effect firmly, fearlessly, and, above all things, justly; being sure that, do as he may, he never will escape censure: if he causes death, some may charge him with manslaughter; or should he refrain from so doing, then others will blame him for neglect. The position is one of great responsibility, and therefore to hit the precise line of duty in such cases is most difficult.[1]

5. Now Martial Law, when Lord Hale wrote his 'History of the Common Law,' was not inaptly described by him as "no Law, but something indulged rather than allowed as a Law." It is in effect a rule for superseding the ordinary Law which necessity more or less urgent must be shewn to justify. Of course it has always been lawful for the Officers of the Crown "to repel force with force,"[2] but where, in the anticipation of this extremity, and to prevent before its commencement the greater evil of a violent outbreak, force is initiated by the Officers of the Crown, there the plea of justification originates.

6. For the practical purposes of this Work, Martial Law must be considered separately in each branch of the subject; that is, as applicable

1. To Officers and Soldiers under the Military Code.
2. To the whole community, Civil and Military.

And this fact must also be borne in mind,—that to whomso-

[1] Mr. Justice Littledale's summing up in Rex *v.* Pinney, 5 Car. and Pay., p. 270. An illustration of its truth may be found in the events following on the Jamaica outbreak in 1865. One section of the inhabitants presented a sword of honour to the Commanding Officer (Colonel Nelson), and the other section indicted him for manslaughter.

[2] See Lord Hardwicke's Report of 1732, and other Papers, Vol. II. p. 623.

ever this Law may be applied, it is the same, although the justification for its use may rest upon widely different considerations.

I. As to Officers and Soldiers under the Military Code.

7. "If," said Sir D. Dundas, "five or six Regiments were to mutiny in the field, would any one tell me you must apply to Parliament before you could reduce those persons to subjection? There must be somewhere, for public safety, a right to exercise such power in time of need. Such a case has happened in our own time. The Officer in command did that which a Soldier in command is bound to do: viz., he took measures for the purpose of suppressing such, and was prepared to put such persons to death if necessary."[1] The firing of an armed Sentry upon a Prisoner of War, or one for whose safe custody he is responsible with his own life, must be justified (if at all) on the same ground of necessity.

8. But this summary method of restraint or punishment has been put in execution to suppress ordinary crime of a less urgent nature where public policy or example needed it. Thus, when the Army was in Holland, in 1794, and Soldiers had committed a robbery and attempted the murder of a woman and child, the Duke of York "did not hesitate for a moment to order the Provost Marshal to proceed to the scene of the outrage, and by the instant execution of the offenders to put a stop to such conduct."[2] The supposed want of this power in the Peninsula was pressed upon the attention of the Cabinet by the Duke of Wellington in 1809.[3] "By the custom of British Armies," he wrote, "the Provost has been in the habit of punishing on the spot (even with death under the orders of the Commander-in-Chief) Soldiers found in the act of disobedience to orders, or of outrage. There is no authority for this practice except custom, which I conceive would hardly warrant it,[4] and yet I declare that I know not in what manner this Army is to be commanded at all, unless the practice is not only continued, but an additional number of Provosts appointed."

[1] Quoted Vol. II. p. 160, note [3], and Lord Loughborough in General Wall's Case, ib., p. 159. [2] Letter quoted, Vol. II. p. 665. [3] Ib., p. 663.
[4] See Vol. vi. Gur. Desp., pp. 517-518.

9. The deliberations of the Law Officers on this question raised by him were thus made known to the Duke. "So far as I can recollect any principle," wrote Lord Castlereagh, "summary punishment seems to be most clearly justifiable when inflicted *instanter* on the commission of the offence, and when the proofs are of a nature to place the guilt of the party beyond *all* doubt. Where time has intervened and the offenders have been committed to custody, when the guilt is to be collected from the evidence rather than from the view, there the intervention of a Court-martial seems the preferable course. I have not found any one who doubted that it would be clearly competent for the General Commanding to punish with death upon his own view of the guilt; but whether he can delegate such a power to his Provost Marshal seems more questionable."

10. The Duke did not, however, flinch from carrying out summary execution upon Soldiers for breach of the Civil Law. In October, 1810, he announced, by General Order, that he was "concerned to have been under the necessity of carrying into execution the determination which he has so long announced of directing the immediate execution of any Soldiers caught plundering, and that a British and Portuguese Soldier have consequently been hanged this day for plundering in the town of Leiria, where they were contrary to order, and for this criminal purpose. He trusts this example will deter others from those disgraceful practices in future, and the troops may depend upon it that no instance of the kind will be passed over."[1] For the suppression of crime he laid down the duties of the Provost Marshal and his Assistants by General Order of November, 1811,[2] making the Provost responsible for the custody of Prisoners, the preservation of good order and discipline, by his presence in those places in which breaches of either are likely to be committed, and by punishing those found in the act of committing breaches of order and discipline. His summary power of punishment was limited to his own view of the crime. His assistants, who were not Commissioned Officers, were to exercise these summary powers only when the crimes

[1] Vol. iv. Gur. Desp., p. 311, and General Order of 10 June, 1812, vol. v. p. 704.
[2] Vol. v. p. 347.

needed such punishment for the sake of example; but they had no power to inflict Capital Punishment,[1] even though they caught the Soldier in the act of committing an outrage. The Provost was to execute his own duty on his own responsibility, it being clearly understood that no Officer whatever had a right to order him or his assistants to exercise his authority.

11. To relieve the Commanding Officers and the Provost Marshal from responsibility in these summary punishments,[2] the Government submitted a Bill to Parliament in 1813, which (when passed as the 53rd Geo. III. c. 99), authorized the assembly of General Detachment Courts for the trial of Military offenders guilty of Civil offences against the inhabitants of the country, but no other amendment in the Law was made during the Peninsular War. The Provost Establishment of the Duke, and the powers which these Officers exercised, rested, therefore, solely upon the Prerogative of the Crown and the customs and usages of the Service as then understood in the Army.

12. Although summary powers of Martial Law were exercised by the Duke of Wellington throughout the Peninsular War, without Parliamentary sanction, it was expedient that, at the close of it, Parliament should give some definite recognition to this system of governing an Army abroad in time of war; therefore, when the late Lord Hardinge became Secretary at War in 1829, and the Military Code was recast, additional powers were given to the General in Command: 1st, by the Mutiny Act authorizing the assembly of Drumhead Courts-martial[3] on the line of march, which appear to have been previously used[4] in the Army; and 2ndly, by the Crown issuing an Article of War (now the 164th), framed on the model of the General Order of November, 1811, giving definite but enlarged powers to the Provost Marshal, to be appointed by the General Officer or the Crown, for the repression of disorders by summary punishment. These powers, and especially the latter, came under discussion in the House of Commons in 1838, and their expediency was unimpeached.[5]

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[1] Vol. vi., pp. 517-518; and see Court-martial trial for punishing without a personal view, vol. xiii. Sup. Desp., p. 685. [2] 41 H. D. (3), p. 1271.

[3] 11 Geo. IV., c. 7, sec. 10; Vol. II., pp. 177, 665, 666.

[4] Sir Thomas Picton's Case, 41 H. D. (3), p. 1273. [5] 41 H. D. (3), p. 1271.

13. II. As to the whole community (Civil and Military).

Under what circumstances Martial Law may be resorted to is not a problem to be decided in anticipation of the event. This was very clearly explained by Lord Castlereagh to the Duke, in the correspondence already adverted to.[1] Admitting the power of summary punishment, even of death, to reside in the Commanding Officer of an Army in the field, "in what precise mode or under what particular circumstances such power is to be exercised could not be determined. The necessity of the case could only be the rule, and the power must be regulated by the conscientious sense of duty and of responsibility." "To be effectual, it must be both *summary* and arbitrary; and therefore, under the British Constitution, it is impossible that such a power should be entrusted *a priori* to any man." This accords with a recent Circular issued from the Colonial Office to the Governors of Colonies on the subject of Martial Law,[2] and may be accepted as the Law in 1872.

14. But, assuming the justifying circumstances to exist, and Martial Law to be proclaimed, it would be an error to suppose that Military Law is thereby (*ex vi termini*) put in immediate operation; for Martial Law is, as we have seen, the annihilation of all other Law (Civil or Military) in respect of the persons upon whom it is to operate.[3] "The union of Legislative, Judicial, and Executive Power in one Person is," as the late Sir Charles Napier[4] aptly expressed it, "the essence of Martial Law," or, as the Duke of Wellington explained to Mr. Stuart (when it was suggested that he should govern Portugal under it), "it is neither more nor less than the will of the General of the Army. He punishes, either with or without trial, for Crimes either declared to be such or not so declared by any existing Law or by his own orders."[5]

15. "It is," said the Duke, on another occasion, "for the authority proclaiming Martial Law distinctly to lay down the rules and regulations, and the limits according to which it is to be carried out."[6] In the absence of any such specific

[1] Vol. II. p. 666. [2] Jan. 1867, printed Vol. II. p. 667.
[3] Ceylon Evidence, quoted Vol. II. p. 160, note [3].
[4] Vol. ii. p. 426 of his Life. [5] Vol. iv. Gur. Desp., p. 24.
[6] Vol. II. p. 502. The Government of America, in April, 1863, issued instruc-

direction, and as better than no Law whatever, the Military Code would furnish the Officer with some guide to his mode

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tions for the guidance of their Armies during the War, from which the following extracts are taken:—

"*Martial Law and Military Jurisdiction.*

"1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying Army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest.

"The presence of a hostile Army proclaims its Martial Law.

"2. Martial Law does not cease during the hostile occupation, except by special proclamation ordered by the Commander in Chief, or by special mention in the Treaty of Peace concluding the War, when the occupation of a place or territory continues beyond the conclusion of Peace as one of the conditions of the same.

"3. Martial Law in a hostile country consists in the suspension by the occupying Military Authority of the Criminal and Civil Law, and of the domestic Administration and Government in the occupied place or territory, and in the substitution of Military rule and force for the same, as well as in the dictation of general laws, as far as Military necessity requires this suspension, substitution, or dictation.

"The Commander of the Forces may proclaim that the administration of all Civil and Penal Law shall continue, either wholly or in part, as in times of Peace, unless otherwise ordered by the Military Authority.

"4. Martial Law is simply Military Authority exercised in accordance with the laws and usages of War. Military oppression is not Martial Law; it is the abuse of the power which that law confers. As Martial Law is exercised by Military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honour, and humanity—virtues adorning a Soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

"5. Martial Law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected, and must be prepared for. Its most complete sway is allowed—even in the Commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

"To save the country is paramount to all other considerations.

"6. All Civil and Penal Law shall continue to take its usual course in the enemy's places and territories under Martial Law, unless interrupted or stopped by order of the occupying Military power; but all the functions of the hostile Government—legislative, executive, or administrative—whether of a general provincial, or local character, cease under Martial Law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

"7. Martial Law extends to property and to persons, whether they are subjects of the enemy or aliens to that Government.

"11. The Law of War does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the War, but also the breaking

of Judicial Procedure. The Mutiny Act and Articles of War are not, however, *ex proprio vigore*, in force; and when the late Sir H. Smith was administering the Cape Government, he was advised by the Local Law Officers that Martial Law was a "thing distinct altogether from the Military Law created by the Mutiny Act and Articles of War," and therefore "that the provisions of the Mutiny Act and Articles of War did not necessarily regulate either the Sentences pronounced by Courts-martial against such Criminals in regard to such Crimes, or the Powers of the Commander-in-Chief in regard to the Commutation of such Sentences."[1] "In my opinion," said Sir D. Dundas before the Ceylon Committee in 1850, "an officer cannot go very wrong who adheres as closely as the circumstances will permit him to the mode of administering the Law under the Mutiny Act; and if he will take the latter part of the oath taken under that Act, it appears to me to afford him a very safe and honest guide in such a critical case."[2]

16. Martial Law may be the rule of Government till a Civil Government can be established in (*a*) a conquered country (as in Scinde), or till it can be restored in (*b*) a rebellious one (as in Jamaica): however, controversial questions more usually arise where it is used or applied to the latter case (*b*) in the suppression of Rebellion, therefore it will be better to confine

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of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of War between the contracting powers.

"12. Whenever feasible, Martial Law is carried out in cases of individual members by Military Courts: but sentences of death shall be executed only with the approval of the Chief Executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the Chief Commander.

"Military Jurisdiction is of two kinds: first, that which is conferred and defined by Statute; second, that which is derived from the Common Law of War. Military offences under the Statute Law must be tried in the manner therein directed, but Military offences, which do not come within the Statute, must be tried and punished under the Common Law of War. The character of the events which exercise these jurisdictions depends upon the local laws of each particular country.

"In the Armies of the United States the first is exercised by Courts-martial, while cases which do not come within the 'Rules and Articles of War,' or the jurisdiction conferred by statute on Courts-martial, are tried by Military Commission."

[1] Vol. II. p. 507.

[2] Quoted Vol. II. p. 163, note.

our consideration to that aspect of the subject in the concluding paragraphs of this Chapter.

17. It is seldom that the initiation of a system of Martial Law for the suppression of Rebellion receives much forethought, and Martial Law may be in operation without any deliberate proclamation from the Executive Government of its existence. In ordinary circumstances, a Riot, which the Peace Officers first endeavour to suppress, precedes it. Then troops are called in to aid the Civil Power, and act for a time at least under the directions of the Magistrates. From necessity or supineness, the latter may either retire or their authority may be completely destroyed, so that the Military Officer alone has to suppress the Riot and restore Peace. Thus a united force of Constables and Soldiers, originally arrayed under the Civil Power, in the course of events passes under the Command of the Military Officer, rightly assuming the responsibility—when the Civil Authorities have shown themselves incapable—of upholding Public Order. Such, in outline, were the facts of the case in 1780, when the followers of Lord George Gordon sought to destroy London.[1] The Military, in acting without the Civil Power, were so far supreme; but this supremacy ceased[2] when the Riots were put down, and the Prisoners were handed over to, and tried by, the Civil Tribunals of the country.

18. Given the necessity for Martial Law, and a Proclamation, though usual as a warning to those thus made subject thereto, is not a condition precedent essential to the legality of that rule.[3] In the absence of any definite instructions, either by Proclamation or otherwise, the Military Officer called on to execute Martial Law would have to depend entirely on his own sense of expediency as to the measures which are necessary for him to adopt in regard to the public safety. In the Canadian Rebellion of December, 1837, a Proclamation was issued and a definite Letter of Instructions issued to Sir John

[1] Vol. II. p. p. 166, and Letters of 1786 printed at pp. 635 and 636, and Order in Council and to the Adjutant General, pp. 659-660. [2] Ib., pp. 167-168.

[3] Sir D. Dundas, Ceylon, 1850, Question 5459, and Opinion of Lords Campbell and Cranworth, Vol. II. p. 499. The same remark applies to reading the Riot Act in ordinary Civil Commotions. See Vol. II. pp. 129-132.

Colborne (then in command) to carry the same into effect with a discretion to pardon Offenders;[1] but the Proclamation, as such, gave to the Governor who issued it no authority which he had not before: nor did it justify—except from necessity—any de-departure from the ordinary rule of Law. "For this reason, *Quod necessitas cogit defendit*," wrote Lords Campbell and Cranworth (both men who subsequently held the Great Seal), "we are of opinion that the prerogative [of executing Martial Law] does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the Ordinary Tribunals, it is impossible to deal according to the regular course of Justice. Where the Courts are open, so that Criminals might be delivered over to them to be dealt with according to Law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such a power can only be conferred by the Legislature, as was done by the Acts passed in consequence of the Irish Rebellions of 1798 and 1803, and also by the Irish Coercion Act of 1833."[2]

19. "In time of Peace the exercise of Martial Law in point of death is declared Murder,"[3] wrote Lord Hale, at the close of 1700: nor do his words need qualification in this century. A Military Officer having Prisoners taken in the Riot should hand them over to the Civil Power, if existing; but, if not existing, then his responsibility is to execute *Justice* in the best manner that the circumstances afford him the opportunity of doing, by Civil Tribunals, if they can be convened;[4] or by Courts-martial, if those Courts only can be summoned. "When it is impossible," said the late Sir James Mackintosh[5] "for Courts of Law to sit or to enforce the execution of their Judgments, then it becomes necessary to find some rude substitute for them, and to employ for that purpose the Military, which is the only remaining Force in the Community."

20. Such necessity arising for the trial of Civilians by Courts-martial, the Commanding Officer will be careful to compose

[1] Vol. II., p. 499.
[2] As to these, see the facts set out, Vol. II. pp. 168-174, 661, 662.
[3] Pleas of the Crown, Vol. i. p. 500. [4] Vol. II. pp. 499, 502.
[5] Vol. I. p. 161.

those Courts, of Men (Civil or Military) whose experience and character afford to the Criminal the best security for the exercise of a sound judgment and discretion in the most solemn function of Judicial Administration which they as Judges are thus unexpectedly called upon to discharge. The Court should be formed as near to the model of the highest Criminal Court as possible: it should proceed upon charges based on the known Criminal Law, and upon sworn evidence given in the presence of the Accused. What he has to say in his defence should be patiently heard, and a Record—complete so far as circumstances will permit—should be made of all the Proceedings. The analogy of the Military Code is to be followed (as we have seen) not as binding, but as directory; for the Jurisdiction of the Court is to be upheld, not by the authority of the Mutiny Act, but by the supreme power of the Executive Government to administer *Justice* at all times.

21. There is little fear that a British Officer, though he may be empowered to do so, will ever desire to invent either Crimes or Punishments against a Prisoner, but the reader may be reminded that both should usually accord with the known Criminal Law. The method of trial cannot aggravate the guilt, nor ought it to increase the just Punishment of the Offender. Where, however, obedience to Military Orders is of vital importance to the Public Security, then disobedience is essentially a Criminal Act.

22. If it should so happen that a part only of a country is under the ban of Martial Law, as was the case in Ceylon[1] in 1848, and in Jamaica[2] in 1865, then, as Crime is Local, care should be taken that the Offender should be arrested[3] and tried, and the Offence should have been committed within the area where Martial Law prevails.

23. Neither can (it is said) a Proclamation of Martial Law have a retrospective operation.[4] If this view be correct, then the offence must have been committed after the Proclamation was issued, and of course must be tried before the same is recalled.

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[1] Vol. II. p. 501. [2] Ib., p. 492. [3] Ib., p. 495.

[4] See the Opinions of Lord Abinger, Sir N. Tindal, and Lord Lyndhurst, given in the Debate of 1826, quoted Vol. II. p. 489.

24. The remedy here—as in the other cases of usurped power—is an appeal to the Common Law Tribunals of the Realm, if they should be existent and the Civil Government sufficiently restored to enable their orders to be obeyed. In Wolfe Tone's Case, the appeal was not made in vain; and the Judgment of Mr. Justice Davis, delivered in the Supreme Court of the United States during the December term, 1865, *in Re* Lambdin P. Milligan, upheld the supremacy of the Civil Tribunals in all cases where they were open, and in "the unobstructive exercise of their Jurisdiction." [1]

25. Nor is this the only appeal that can be made to those Courts; for there the Military Officer may be arraigned to answer with his life for the oppression or cruelty (if any) with which he may have carried out his extraordinary powers. In earlier cases, where the Crown had received honest service from Officers (Civil or Military) serving either at home or in distant Dependencies, their acts in support of the Crown against a rebellious Community were adopted as those of the State, and a *Nolle prosequi* was entered to protect them against legal prosecution from those whose name may be *Legion*.[2] More recently, a different policy has been initiated.[3] Those charged with wrong in the Civil or Criminal Courts here are to meet the Indictment or Suit upon their own responsibility, either alone, if Governors, or with the aid of a Public Department, if Military Officers;[4] but, anyhow, they must either propitiate their adversaries or take the chance of what a Grand before, or a Petty Jury after, a public trial may determine.

26. How such an accusation is to be met is not at present within our legal experience to detail. An executive Officer, resting his authority upon "Martial Law," must (I presume) be prepared to show that it was declared not only *de facto* but also *de jure*; for otherwise, indeed, any usurpation might be tolerated.[5] That done, his acts must be justified as coming within the limit

[1] No. 350, Certified Copy of Opinion, p. 9. [2] Vol. II. pp. 131-136, 615.

[3] Vol. II. p. 177.

[4] Colonel Nelson, in the Jamaica Case, was arrested by a Bow Street Warrant granted under 11 & 12 Vic., c. 42, sec. 2, and 24 & 25 Vic., c. 110, sec. 9. See Reg. *v.* Vaughan, 9 B. and S., p. 340.

[5] Vol. II. pp. 152-155.

of his authority, and, therefore, he must transfer by legal evidence all the incidents of Rebellion from, it may be, a distant Colony to the arena of Westminster Hall. Whether all the links in the chain can be completed is the risk upon which his safety depends, unless, indeed (as in a recent case) his fellow-countrymen, who are sworn as a Grand Jury, afford him protection.

CHAPTER IX.

COURTS OF INQUIRY.

1. IN entering upon this Chapter, it is essential to divide the consideration of the subject into two Sections.

1. As to Commissions or Courts of Inquiry held by order of the Crown or a Commanding Officer under Prerogative, and without Statutory Authority.

2. As to such Courts as are held under the like order, with such Authority given either by the Mutiny or some other Act, or by the Articles of War, or Regulations put forth under Statute by the Crown,

and to treat of them according to the order in which they are thus presented to the reader.

I. As to Courts of Inquiry held without Statutory Authority.

2. In a previous Chapter I have endeavoured to show that, after the Mutiny Act had sanctioned the infliction of Capital Punishment by Courts-martial for specific crimes, the same Tribunals continued (as theretofore) to exercise an inferior authority in other matters not embraced in the Act. That, in fact, Courts-martial exercised and were constituted under Statutory, for serious crimes, and under Prerogative Authority, for lesser ones, or for such acts of omission or commission as were scarcely crimes at all.[1] In the progress of Legislation this Prerogative Authority became absorbed by the provisions of the Mutiny Act, being extended to mixed matters of administration and discipline. But, as this absorption was gradual, it is not easy to determine in what year or period the practice originated of summoning (1) Courts-martial under the Mutiny

[1] Chap. IV., par. 48.

Act, to exercise the functions of Courts of Inquiry, or (2) Courts of Inquiry under the Prerogative, to exercise that Jurisdiction.

3. The truth of these remarks will become more apparent in tracing the history of these Courts; for in the earlier period of their use they appear to have been summoned as Courts-martial to examine (as Courts of Inquiry now do) into the truth of allegations, to report on the matter of fact, with the opinion of the Court thereon, for the assistance of the Sovereign or the General Officer in Command of the Army.[1] In exercising their functions under the authority of the Crown, they probably did so with much the same efficiency as they would have done had they been sitting as Judges on a Court-martial; as then, and for many years later, no coercive power was possessed by a Court-martial over any persons to compel either their attendance or their testimony as Witnesses.[2] Therefore Courts-martial, or Courts of Inquiry, then did not so essentially differ from each other as now, when the first rests on Statutory, and the other (save the Courts which will be specially referred to hereafter) only on Prerogative Authority.

4. Neither must the method of governing the Army by the confidential Reports of "General Officers"[3] advising the Crown through the Secretary at War be overlooked in this question. At an early period of William III.'s reign he constituted such a Board,[4] and in the reign of his successors resort was had to this advice by the establishment of a permanent Board of

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[1] This letter to Mr. Byde (as to whose appointment as Judge Advocate, see Vol. II., p. 360, note [2]) is taken casually from the War Office Letter Book (138), p. 168, for illustration :—

"Whitehall, 17th March, 1708-9.

"SIR,—By Her Majesty's direction, I send you the enclos'd Petition of Lieut. Lacklan Mackintosh of ye Lord Mark Kerr's Regt., with his Lordship's answer; and am to signify to you Her pleasure that you summon a Court Martiall on Saturday morning next to examine the allegations of the said Petition, and to report the matter of fact with their opinion thereupon, that the same may be lay'd before His Grace the Duke of Marlboro' on Monday morning next.

"I am, Sir,

"Your most humble Servant,

"To Thos. Byde, Esq." "R. WALPOLE.

[2] Chap. VI., par. 47-49 *ante*.

[3] As to these, see Vol. II., p. 257, 357.

[4] Chap. III., par. 33 *ante*.

Officers. When, however, special matters needed the investigation and advice of other experienced Military Officers, a Royal Sign-Manual Warrant was issued, under the countersign of the Secretary at War to the Judge Advocate General, requiring him to summon such Officers as were named therein, to be a Board of Inquiry. The first of these Special Warrants (so far as I can trace) was not that which is usually cited as such in Sir John Mordaunt's[1] (1757), but that in Sir John Cope's case (August, 1746), under the countersign of Henry Fox, afterwards Lord Holland.[2]

5. The disasters of Sir John Cope at Preston Pans are probably known to most readers, and to many from the pages of the noble and accomplished historian of the Rebellion of 1745. After the close of it the king "thought proper to direct a Board of General Officers to examine the conduct, behaviour, and proceedings of Sir John Cope and Colonel P. Lascelles, from the time of the breaking out of the Rebellion until the action was over at Preston, near Seaton; and likewise into the conduct, behaviour, and proceedings of General Fowke, from the time he took the command of the two Regiments of Dragoons, then in Edinburgh, until the said action was over, which happened on the 2nd September, 1745." He did so, by naming General Wade as President and four Lieutenant Generals[3] "as a Board," with authority to summon "such witnesses as should be able to give testimony touching the conduct, behaviour, and proceedings of the said several Officers," "strictly to examine into the matters, and to report the state thereof as it should appear to them, together with their opinion what is proper to be done thereupon."

6. These instances—that in 1708 and this in 1746—furnish a type of each class of case, for which, first in the "administration" and then in the "government" of the Army, Courts of Inquiry have been used. No doubt, in either the principles of the Common Law are violated; for "Commissions or Courts only to inquire are against Law," because, as stated by Lord Coke,[4] a man may be (1) unjustly accused, and shall be without

[1] Form in Appendix V. of Tytler. [2] Mis. Bk., pp. 12, 13.
[3] Guise, Lord Cadogan, Folliot, Duke of Richmond.
[4] Commission of Inquiry, 12 Coke Rep., p. 31.

remedy, or (2) defamed, and not have any traverse of it. The Military Law does not, however, profess to follow the Common Law, or the necessity for it would altogether cease.

I. In the Administration of the Army.

7. It may readily be supposed how frequently the necessity must arise for information from a Regiment or Station upon claims put forward against the public; nor less frequently does the same necessity arise out of other ordinary matters of Administration. To satisfy the requirements of the Finance Minister responsible to Parliament for the disbursement of the public treasure, this information is often obtained through the agency of a Court of Inquiry, which at his instance is assembled to examine into the facts, to report upon the circumstances, and, if called upon so to do, to offer their opinion on the nature of the claim, or upon the incidents out of which the same has arisen. In this manner very many matters are adjusted which otherwise would lead either to adverse judicial investigation, if the claim were just and yet ignored, or to fraud, if put forward (with success) to impose upon the public. To cut off the Finance Minister from this aid to his Administration is a suggestion scarcely consistent with the official experience of those by whom it has been made.

II. In the Government of the Army.

8. Consistently with the public safety, the Army can only be governed by absolute power being vested in the Crown;[1] which, when occasion requires it, must be exercised summarily, and, may be, silently, against the status of Officers and Soldiers. Instant dismissal of individuals, or prompt disbandment of Regiments without cause assigned, is an exercise of power which must be lodged somewhere, and by our Constitution it is confided to the Crown as the supreme power in the State. Out of this may arise —upon occasions felt by a conscientious[2] Minister—the necessity of previous confidential inquiry before this power of annihilation is exercised against those represented as obnoxious to discipline, Civil as well as Military. Or again, as the Criminal

[1] Vol. II., pp. 40, 118-123, 328.

[2] See Adye's Remarks, p. 73.

Law of the Army can only be put in force against an Inferior by a Superior Officer, cases may arise in which the facts are not so patent, or the source of information so impartial, as to satisfy the latter Officer that justice demands a Court-martial trial upon the accused.

9. In these or any similar cases, whether for the "Administration" or "Government" of the Army, a Court of Inquiry being summoned, the members, though unsworn to secrecy, discharge according to the rules of Military, a function analogous to that of a Grand Jury in Civil, procedure. No disclosure is made of the Evidence voluntarily adduced, nor are they required to arraign the supposed culprit before them. To throw their proceedings broadcast before the world, for any motive, is to sow dissension, and often to fix a stigma of blame upon one or more Officers who may never have heard of the evil imputed to them. "The true conception of a Court of Inquiry," said Mr. Windham, "was of persons delegated to inquire into the circumstances of any transaction for the purpose afterwards of advising His Majesty confidentially whether there was ground for submitting the matter to Judicial Inquiry. They were advisers, not judges; or if judges, only whether the matter ought to be submitted to judgment. As analogous to a Grand Jury, they ought to keep their proceedings secret; and as a secret tribunal, they were to determine whether they would advise His Majesty to try his Officers." Then, speaking of the *open* Court of Inquiry upon the Convention of Cintra, of which the Duke (then Sir A. Wellesley) so bitterly complained, he blamed the Ministers for having "conceived and brought forth that monstrous production unknown to our Laws and usages, an open Court of Inquiry—a show of trial without the reality."[1] "A Court of Inquiry," wrote Sir Charles Napier,[2] no mean authority on Military Law, "ought generally to be a closed Court; no one allowed to enter but such individuals as are called for, and who, being privately examined, are sent out. If

[1] 12 H. D. (O. S.), pp. 939-940.

[2] Umballah, 17th Nov, 1849. Records of his Indian Command (Mawson, Calcutta, 1851), p. 59; no bad book for the perusal of one interested in the view which a Military Magistrate entertained of his duty.

any person happens to be accused of misconduct, he is called upon for his statement of the matter in hand like any other person: he may either appear or refuse to appear as he pleases, unless ordered by superior authority, and either answer any questions put to him, or refuse to answer. The Court may either communicate to him what has been said, or refuse to communicate what it has elicited; it does what it deems best suited to obtain information on which higher authority can safely act. It is generally objectionable to make a Court of Inquiry an open Court."

10. This is unquestionably the view taken by the Common Law Tribunals of these Courts. As against Officers in the Army their function is admitted;[1] while, on the broad rules of public policy and convenience, matters secret in their nature —involving delicate inquiry and the names of persons—stand protected from publication. Their finding is, in fact, advice and information confidentially given to the Crown or General Officer, in furtherance of the exercise of a public duty upon the result of such inquiry.

11. The extraordinary circumstances under which the Chelsea Inquiry[2] was held in 1856, obliged the Ministers to depart from their *original* intention[3] of having that conducted as a confidential inquiry. Having submitted the Military efficiency of the General Officers in the Crimea to the decision of two gentlemen

> "That never set a squadron in the field,
> Nor the division of a battle knew,"

and laid their *ex parte* statements before Parliament without the knowledge of those Officers to whom blame was imputed, *public* inquiry then became inevitable — an *exceptional* proceeding, which has not however varied the *rule*, viz., that these are confidential inquiries.[4]

12. Accepting the "analogy drawn" by Lord Chelmsford

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[1] Home *v.* Bentinck, 2 Bro. and Bing., p. 161.

[2] Report of Board of General Officers, printed by command, 1856.

[3] Contrast Lord Palmerston's Speeches on 21st and 28th Feb., in 140 H. B. (3), pp. 1052, 1480.

[4] The Case of Naval Courts of Inquiry, discussed in April, 1863, 170 H. D. (3), pp. 381-395.

"between Courts of Inquiry and Grand Juries as perfectly correct,"[1] it is clear that there is and should be no trial of an accused person, nor has such (if any) person a *locus standi* before the Court, either to interfere in the proceedings, or to be present throughout, or to note down, if permitted to be present, the statements made for the use and information of the Crown either for or against him. All public servants, Civil or Military, no doubt are bound by the law of obedience to attend, if called upon to do so, where a Court of Inquiry may be summoned to meet. Being there, they speak not as sworn witnesses, but as persons offering such information as each in his discretion sees fit to tender; for the Court has no power to swear or to punish them as witnesses for contumacy or silence. Such information as may be thus collected is, for convenience, arranged in the same form as that used by a Court-martial;[2] each member signing the Report, which is sent to the Convening Authority through the President.

13. The ultimate use which is to be made of information thus obtained involves very different considerations. Before any one is prejudiced by the result it would appear desirable, if not demanded by Justice, that the substance of the charge be communicated, and an opportunity of explanation be afforded to him; while, on the other hand, to disclose—as in a late case was done—all the proceedings of the Court[3] to the offending Officer is to violate the fundamental condition of secrecy under which the servants of the Crown were induced to record their opinions either as members or as informants of the Court. In this matter the Crown or Executive Officer, having formed a Court and invited information, is bound to withhold[4] the Record from publication; for a disclosure too frequently exposes those entitled to this protection to a merciless persecution from the offending Officer whose conduct has been under investigation.[5]

[1] 170 H. D. (3), p. 395. [2] L. R., par. 786 *post.* [3] 170 H. D. (3), p. 389.

[4] Beatson *v.* Skene, 5 H. and N., p. 838; and Vol. I., p. 189.

[5] In Dickson's Case, an Attorney and shorthand writer were admitted to attend the Inquiry, and a flood of litigation overwhelmed all the servants of the Crown, from the Secretary of State down to the Colonel of the Regiment. (Dickson *v.* Wilton, 1 Fost. and Fin., p. 419; Same *v.* Combermere, 3 ib., p. 527). In Dawkins' Case, the same thing happened, and with the same result. Dawkins *v.* Rokeby, 4 ib., p. 806. Same *v.* Pawlett, 9 B. & S., p. 768. And other actions are still pending.

14. Whether these Courts should be recognized by the Mutiny Act or Articles of War, and, if recognized, have extended powers given to them, is a question which Mr. Tytler raised in his 'Essay upon Military Law.'[1] Since then a Secretary at War has desired that their proceedings should be judicial, and their investigations carried on under the sanction of an oath.[2] With the exception of what will be mentioned in the concluding portion of this Chapter, nothing has been done;[3] nor is anything so much needed as definite instructions as to the method in which these extra-judicial inquiries should be conducted by the Court, and as to the rules by which Ministers as Privy Councillors should be guided in using the information thus afforded to them.[4]

II. As to Courts of Inquiry under Statutory Authority.

15. In entering upon the second division of the subject, it may be convenient to enumerate the several Courts, Boards, or Committees of Inquiry that are authorized to be assembled under Articles of War or Statute with reference to Military Law or Procedure.

1st. Under the Articles of War, one or other of these may be assembled to inquire, and then

(*a*) To report on Wounded Officers.
(*b*) To report on Discharged Soldiers.
(*c*) To report on a Soldier's Bodily Injuries.
(*d*) To report on a Soldier's Desertion.
(*e*) To report on a Soldier's Claims.

These generally relate to the Regular Army; but when other Forces are subject to the Mutiny Act, these provisions of the Articles of War would in some measure be applicable to them.

2ndly. (*f*) Under the Regimental Debts Act, for the collection of the assets, &c., of a deceased Officer or Soldier on Service.

3rdly. (*g*) Under the Volunteer Act, 1863, to report on matters submitted by the Convening Authority.

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[1] Page 348. [2] Case, and Law Officers' Reports in 1803, Vol. I. pp. 541-550.
[3] As to Naval Courts of Inquiry under the Merchant Shipping Act, 17 & 18 Vic., c. 104, sec. 260-269.
[4] As to the oath of a Secretary of State, see Vol. II. p. 730.

1st. Under the Articles of War.

16. Courts or Boards of Inquiry are not referred to in the Mutiny Act; but, since the year 1829, the Articles of War have directed the assembly of these Tribunals for the several specific purposes which I have previously enumerated. As no alteration in the Law has been made with regard to two of the Boards then established, it may be convenient to treat of them without further preface.

17. (*a*) Upon referring to Article 88 of 1830, which is identical with Article 165 of 1872, in the Appendix, it will be seen that, "for the purpose of securing a provision for life to any Officer wounded before the Enemy, the Secretary of State may convene a Military Medical Board of not more than five nor less than three Medical Officers, to inspect and report upon the state of the Officer's wound. The Article supposes the Board to be cognizant of "the Rules and Regulations for granting Pensions to Wounded Officers," inasmuch as the "Declaration" (which each member is to make in the presence of the Wounded Officer) requires him impartially to inquire into and give his opinion on the case according to the true spirit and meaning thereof. They, like the Judges of a Court-martial, are sworn to secrecy, and their Report goes through the Director General of the Army Medical Department to the War Office, for official use.

18. (*b*) Upon referring to the 87th Article of 1830, which is the same as Article 166 of 1872, it will be seen that "to secure to the deserving Soldier when discharged" a provision proportioned to the length and nature of his service, and to enable the Chelsea Commissioners to carry out "the Rules and Regulations for Pensioning Soldiers," "the services, conduct, character, and cause, of the discharge" of every Soldier are to be ascertained before a Regular Board, to be held for the purpose of verifying and recording all these necessary particulars. The Board is to consist of three Officers; the second in Command being the President, and the two next Senior Officers on the spot being members. Every Military person who may be summoned by the President is to attend and give to the Board such information as he possesses on the subject of the Inquiry. The duty of the Board is "restricted to the faithful and impartial record of the Soldier's services and conduct at the close of his Military

career," and they are to be governed in the discharge of it by the Pension Regulations (which are to be produced before the Board), and by the "Declaration" (which each Member is to make in the presence of the Soldier whose case is under inquiry) upon honour duly and impartially to inquire into the matters brought before them; and, in doubt, "according to my conscience, the best of my understanding, and the custom of the Service in like cases."

19. (*c*) The interests of the Officer and Soldier having been thus protected by Lord Hardinge, by whom these arrangements were initiated, he—not unmindful of public interests, nor ignorant of the frauds that were then, as now, not unfrequently practised against them—directed an inquiry by Court-martial (but which is now to be otherwise conducted), to detect malingering or self-inflicted injuries. On turning to the 82nd Article of 1872,[1] in the Appendix, it will be seen that whenever a Soldier, either on or off duty, shall become maimed, mutilated, or injured (except by wounds in action), he shall be forthwith brought before a Court of Inquiry.

20. The manner in which this Court is to be formed is not prescribed; but the purpose of it is to report their opinion whether the maiming, mutilating, or injuring was occasioned by design. If they report it as occasioned by the designed and wilful act of the Soldier (or by any other person at his instance) to render himself unfit for Service, then he is forthwith to be brought to trial before a General or District Court upon the charge of disgraceful conduct; and the proceedings of the Court of Inquiry are to be sent up (through some circumlocution) to the Chelsea Commissioners for their guidance upon the Soldier's ultimate discharge and application for Pension.

21. (*d*) Another inquiry was originated by Lord Hardinge in the Articles of 1829,[2] which is now decided to be carried out under 167th of the Code of 1872. The Article as origin-

[1] In 1830 this Art. was 41, and in 1840 it was 40. In 1847 it was 82, and so continued till 1858, when a Court of Inquiry was substituted for a Court-martial in the preliminary investigation.

[2] It was 89 in that year, 82 in 1830, 147 in 1857, when the Art. was essentially altered in its effect by amendment; then 171 in 1860, and 167 in 1869, when the inquiry was to be made after twenty-one days' absence, and not after two months', as theretofore.

ally framed, and as it continued till the year 1857, authorized an inquiry which—not being made on oath—was of little value other than as a Regimental Record of a Soldier's absence or Desertion. In the latter year, however, the Article was so altered as to supply in some degree what the Duke of Wellington[1] thought so essential, viz., evidence recorded of a fact which should be judicially accepted, though the Witnesses did not appear before the Prisoner at his trial.

22. Upon reference to the Article, it will be seen that, after a Soldier has been illegally absent from his duty for twenty-one days, a Court of Inquiry, consisting of three Officers, shall forthwith assemble, who are empowered to examine Witnesses upon oath respecting the fact of such absence;[2] and, having received proof on oath of the fact, they are to declare such absence and the period thereof, and the Commanding Officer is to enter a Record of such absence and declaration in the Regimental Books.

23. Looking at Desertion as (it formerly was) a serious offence, punishable either by death or penal servitude, the effect which the Article gives to this entry is open to controversy; for, should the Soldier not surrender, this Record has the legal effect of a conviction for Desertion, or, upon his surrender and arraignment, is admissible as evidence of Desertion, upon which —proof of identity being given—the Soldier may be found Guilty.

24. (*e*) I have before remarked[3] that the Articles of 1672 provided for the redress of wrongs inflicted by the Superior upon the Inferior Officer—the remedy given by the Articles of 1717 being "Justice done to the Complainant at a Regimental Court-martial."[4] The same provision continued until the year 1860, when Article 13 in the Code of 1872 was altered as it now stands—*from* a Court-*martial* to a Court of *Inquiry*—the subject of investigation being, as between the Soldier and the Complainant, a matter "affecting Pay or Clothing." At no time was the decision of the Regimental Court final, but either of the dissatisfied parties could appeal (as now) to a General Court—at the risk of Punishment being awarded by such Court, should the Appeal be pronounced groundless and vexatious.

[1] Chap. VI., par. 52 *ante*.
[2] And the deficiency of kit which is not material for the present.
[3] Chap. II., par. 40; and Chap. IV., par. 9. [4] Art. 19.

2ndly. Under the Regimental Debts Act, 1863.

25. In all the Military Codes,[1] from the earliest to the latest, some provision has been made for the collection and distribution of the effects of the Deceased Officer and Soldier. In our Modern Code this provision was found in the Articles of War (supplemented by some provision in the Statute Law) until 1863, when the Act (which is named at the head of this paragraph) was passed for that object.

26. (*f*) Upon reference to its provisions and to the Regulations put forth under the authority contained in the Act (which will be found in the Appendix I) it will be seen that, on the death of an officer or Soldier *on Service*, a Committee of Officers, as prescribed by the Regulations, is to be appointed by the Commanding Officer to secure his effects, and to make an inventory thereof, and an account of his Debts and Credits. The duty here imposed is Statutory, and each Officer is responsible to those interested in the Deceased's estate for their acts of omission or commission, so far as either may justly become the subject of complaint.[2] The Committee have a prior title to the Deceased's assets against all other claimants, until the preferential charges be paid or their authority superseded by the Deceased's widow or next of kin, in the manner which the Act provides. Whether or how far this Act may be held to apply to Officers or Soldiers, other than those of the Regular Army, has not been determined, but its provisions are obviously intended to meet the case of persons dying in places beyond their ordinary domicile.

3rdly. Under the Volunteer Act, 1863, and Regulations.

27. The only Statutory provisions having reference to the Auxiliary Forces are those which are contained in the Volunteer Act, 1863, and in the Regulations put forth under that Statute. Resort has not unfrequently been had to the assistance of these Courts to aid the Lord Lieutenant in the general administration of the Volunteer Force.

28. (*g*) By reference to the Act and Regulations printed

[1] In 1639, see Vol. I. p. 438. In 1642, ib. p. 444. In 1666, ib. p. 448. In 1672, Art. 70. In 1686, Art. 59. In 1717, Art. 45. In 1872, sec. 98; see Chap. IV., pars. 15-18. And see Grant *v.* Gould, *sup.* [2] Vol. I. p. 213.

in the Appendix, it will be seen, first, that the Lieutenant of the County might, and the Crown now may, assemble a Court to inquire into any matter relative to the Corps or to any *Officer* or Volunteer, and to record the facts and circumstances ascertained on such inquiry, and, if required, to report on the same for the information and assistance of the Crown.

2ndly. That the Commanding Officer may, in like manner, assemble a Court to inquire into any matter relative to the Corps or to *any Volunteer*, not being a Commissioned Officer of the Force.

Neither of these Courts can administer an oath, and each must be guided in the discharge of its duties by the Regulations put forth and printed elsewhere.

29. With regard to these Statutory or quasi-statutory Courts, the purpose and method of their inquiry must be strictly confined to the terms of the Statute or Article under which they derive their authority. Where directed to summon Witnesses, the Courts are competent (I apprehend) to swear[1] them and to take their testimony as of record. Each Court should also be constituted as directed for the Jurisdiction and Finding (as in *d*) would otherwise be void. In cases where the inquiry is preliminary (as in *c* and *e*), the discretion which is given by the Articles would not be so narrowly watched.

30. In concluding this Chapter, it may be well to remark that the inquiries embraced in this division of the subject, some of which partake of the nature of Judicial proceedings, are not to be considered as secret or confidential in the same sense as those words imply when used in reference to inquiries treated of in the first Division. For where persons give their testimony under the sanction of an oath and upon legal summons from the Crown, their information is scarcely voluntary; nor can they say that they have been invited to make statements under the representation that they would be received and treated as "Confidential" Communications.

[1] 14 & 15 Vic. c. 99, sec. 16.

APPENDIX.

APPENDIX A.—CHAP. III.

THE FIRST MUTINY ACT (1 WILLIAM & MARY, CAP. 5) AS AMENDED DOWN TO AND INCLUSIVE OF THE YEAR 1717.

"*An Act for punishing Officers or Soldiers who shall Mutiny or Desert their Majestyes Service* [*and for punishing false*[1] *Musters*] [*and*[2] *for payment of* [*the*[3] *Army and*] *Quarters*].[2]

"WHEREAS, the raising or keeping a standing Army within this kingdome in time of peace unlesse it be with consent of Parlyament is against law. And whereas it is judged necessary by their Majestyes and this present Parlyament That dureing this time of Danger[4] severall of the Forces which are now on foote should be continued and others raised for the Safety of the Kingdome for the common defence of the Protestant Religion and for the reduceing of Ireland.

"And whereas noe man may be forejudged of Life or Limbe, or subjected [5][in time of peace] to any kinde of punishment [within this Realm] by Martiall Law, or in any other manner than by the judgement of his Peeres, and according to the knowne and Established Laws of this Realme. Yet neverthelesse, it being requisite for retaineing such Forces as are or shall be raised dureing this exigence of Affaires in their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or Stirr up Sedition, or shall desert Their Majestyes Service [within this Realm or the Kingdom of Ireland] be brought to a more exemplary and speedy Punishment than the usuall Forms of Law will allow.

2. "Bee it therefore Enacted by the King and Queenes most Excellent Majestyes by and with the Advice and Consent of the Lords Spirituall and Temporall and Commons in this present Parlyament assembled, and by authoritie of the same. Exciting mutiny.

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[1] The first and last insertion [ ] were in 1 and 2 William & Mary, sect. 2, c. 4, and 10 Anne, c. 33.

[2] First inserted in 2 and 3 Anne, c. 16.

[3] First inserted in 4 William and Mary, c. 13.

[4] Chap. III., par. 8.

[5] These words in [ ] inserted in the 1st Mutiny Act of Queen Anne's reign. 1 Anne, Stat. 2, c. 20 [or 16].

That from and after the 12th day of Aprill, A.D. 1689, every person being in Their Majestyes Service in the Army, and being mustered and in pay as an Officer or Soldier, who shall at any time before the 10th day of November, A.D. 1689, excite, cause, or joyne in any mutiny or sedition in the Army or shall desert Their Majestyes Service in the Army, [1] shall suffer death or such other punishment as by a Court-Martiall shall be inflicted.

Punishment.

3. "And it is hereby further enacted and declared, That Their Majestyes, or the Generall of their Army for the time being, may by vertue of this Act have full power and authoritie to grant Commissions to any Lieftenants, Generall or other Officers, not under the degree of Collonells, from time to time to call and assemble Court-Martialls for punishing such offences as aforesaid.

Crown may grant Commissions to call Courts-martial.

4. "[2] And it is hereby further enacted and declared, That noe Court-Martiall which shall have power to inflict any punishment by vertue of this Act for the offences aforesaid shall consist of fewer than thirteene, whereof none to be under the degree of Captaines.

Number of Members.

5. "Provided alwayes, That no field Officer be tryed by other

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[1] The following words were inserted in 1716:—

Extract from sec. 1 *of* 3 *Geo. I., c.* 2 (1716).

"[Or persuade, or advise any other Soldier in His Majesty's Service, to desert His Majesty Service in the Army; or if an Officer or Soldier in His Majesty's Army shall, either upon land within or out of Great Britain or upon the sea, hold correspondence with any rebel or enemy of His Majesty or give them advice or intelligence either by letters, messages, signs, or tokens, or any manner of way whatsoever, or shall treat with such rebels or enemies or enter into a correspondence with them without His Majesty's license or license of the General; or shall refuse to obey the Military order of his Superior Officer or shall resist any Officer in the execution of his office, or shall strike, draw or offer to draw or lift up any weapon against his Superior Officer upon any pretence whatsoever, or being a Soldier actually listed in any Regiment shall list himself into any other Regiment without a discharge from the first Regiment]."

In 1717 these words were omitted, and the following substituted:—

Extract from sec. 1 *of* 4 *Geo. I., c.* 3, 1717.

"[Or being a Soldier actually listed in any Regiment shall list privately in another without a discharge, or shall refuse to obey any lawful command of his superior officer]."

The other offences of 1716 were transferred to the Articles of War 1717.

[2] In 1717 as sec. 3 of 4 Geo. I., c. 3, this was inserted. "That it shall be lawful to, and for such Court-martials by their sentence or judgment, to inflict corporal punishment not extending to life or limb on any Soldier for immoralitics, misbehaviour, or neglect of duty."

than field Officers. And that such Court-Martiall shall have power and authoritie to administer an oath to any witness in order to the examination or tryall of the offences aforesaid. Field Officers how tried. Colonel may administer oath.

6. "Provided alwayes, That nothing in this Act contained shall extend or be construed to exempt any Officer or Soldier whatsoever from the ordinary processe of Law. Proviso for ordinary process of Law.

7. "Provided alwayes, That this Act, or anything therein contained, shall not extend or be any wayes construed to extend to or concerne any of the Militia Forces of this Kingdome. Act not to extend to Militia.

8. "Provided alsoe, That this Act shall continue and be in force untill the said 10th day of November, A.D. 1689. Act in force till 10 Nov., 1689.

9. "Provided alwayes, and bee it enacted, That in all tryalls of offenders by Courts-Martiall to be held by vertue of this Act, where the offence may be punished by Death, every Officer present at such tryall, before any proceeding be had thereupon, shall take an oath upon the Evangelists before the Court (and the Judge Advocate or his Deputy shall, and are hereby respectively authorized to administer the same) in these words, that is to say:— Members of Court-martial to take an oath.

"'You shall well and truly try and determine according to your evidence the matter now before you between Our Soveraigne Lord and Lady the King and Queen's Majestyes and the Prisoner to be tryed,

"'Soe helpe you God.'

10. "And noe Sentence of Death shall be given against any offender in such case by any Court-Martiall unlesse nine of thirteene Officers present shall concur therein. And if there be a greater number of Officers present, then the judgement shall passe by the concurrence of the greater part of them soe sworne, and not otherwise; and noe Proceedings, Tryall, or Sentence of Death shall be had or given against any Offender, but betweene the houres of eight in the morning and one in the afternoone." [1] Where sentence of death given. Number of majority of Officers.

[1] This section (as 40) was inserted in 1717. "That it shall be lawful for His Majesty to form, make, and establish Articles of War, and erect and constitute Courts-martial with power to try, hear, and determine any crime or offence by such Articles of War, and inflict penalties by sentence or judgment of the same as well within the Kingdoms of Great Britain and Ireland as in any of His Majesty's Dominions beyond the sea."

APPENDIX B.—CHAP. IV.

PROVISIONS RELATING TO THE ADMINISTRATION OF JUSTICE BY COURTS-MARTIAL UNDER THE MUTINY ACT, 1872.

GENERAL PRINCIPLES OF THE ACT:—

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35 VICTORIA.—CHAP. III.

AN ACT FOR PUNISHING MUTINY AND DESERTION, AND FOR THE BETTER PAYMENT OF THE ARMY AND THEIR QUARTERS. [23*rd April* 1872.]

WHEREAS the raising or keeping a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law: —— AND whereas it is adjudged necessary by Her Majesty, and this present Parliament, that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of Her Majesty's Crown, and that the whole[1] number of such forces should consist of one hundred and thirty-three thousand six hundred and forty-nine men, including an average number of six thousand one hundred and eighty-five, all ranks, to be employed with the depôts in the United Kingdom of Great Britain and Ireland of regiments serving in Her Majesty's Indian possessions, but exclusive of the numbers actually serving within Her Majesty's Indian possessions: —— AND whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by judgment of his peers, and according to the known and established laws of this realm; —— yet nevertheless it being requisite, for the retaining all the before-mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition or shall desert Her Majesty's service, or be guilty of crimes and offences to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow: —— BE it

Number of men to consist of 133,649, including those employed at depôts of regiments serving in India, but exclusive of those actually serving in India.

[1] Should the Army, in fact, exceed this number, the liability to the Mutiny Act would not be affected by the excess. See Vol. I. p. 178, and the discussion in Parliament, 14 Parl. Hist., pp. 434, 461, 27 Parl. Hist., p. 169. However, see Sec. 59 of Mutiny Act, 1869 & 1872.

therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. IT shall be lawful for Her Majesty to make Articles of War for the better government of Her Majesty's army[1] which articles shall be judicially taken notice of by all judges and in all courts whatsoever; —— and copies of the same, printed by the Queen's printer, shall, as soon as may be after the same shall have been made and established by Her Majesty, be transmitted by Her Majesty's Secretary of State for the War Department to the judges of Her Majesty's superior courts at Westminster, Dublin, and Edinburgh respectively, and also to the governors of Her Majesty's dominions abroad:——PROVIDED that no person within the United Kingdom of Great Britain and Ireland, or within the British Isles,[2] shall by such Articles of War be subject to suffer any punishment extending to life or limb, or to be kept in penal servitude, except for crimes which are by this Act expressly made liable to such punishments as aforesaid, or shall be subject, with reference to any crimes made punishable by this Act, to be punished in any manner which shall not accord with the provisions of this Act: —— PROVIDED also, that nothing in this Act contained shall in any manner prejudice or affect any Articles of War[3] or other matters made, enacted, or in force, or which may hereafter be made, enacted, or in force, under the authority of the Government of India, respecting officers or soldiers or followers in Her Majesty's Indian army, being natives of India; and on the trial of all offences committed by any such native officer or soldier or follower, reference shall be had to the Articles of War framed by the Government of India for such native officers, soldiers, or followers, and to the established usages of the service.

Articles of War made by Her Majesty to be judicially taken notice of, and copies printed by the Queen's printer to be transmitted to judges, &c.

2. ALL the provisions of this Act shall apply to all persons who are or shall be commissioned[4] or in pay as an officer, or who are

[1] If for any other purposes, the Articles would be *ultra vires* under this section. They can only bind the persons liable to the Mutiny Act. Vol. I. pp. 149-150.

[2] This is worthy of notice, that there is no such limitation upon the operation of Articles in other places, and in each of which the validity of the Articles would have to be tested by the Rules laid down by Chief Justice Cockburn. See Vol. II. pp. 175-176; Chap. III., par. 21; Chap. VIII., par. 1, *ante*.

[3] As to the authority on which these Articles stand, see Vol. I. pp. 181-187, and pp. 268-270, and Chap. IV., *ante*.

[4] Volunteers serving without pay, or persons not Officers or Soldiers, but

or shall be listed or in pay as a non-commissioned officer or soldier, and to all warrant officers, and to all persons employed on the recruiting service receiving pay, and all pensioners receiving allowances in respect of such service, and to persons who are or shall be hired to be employed in the royal artillery, royal engineers, and to master gunners, and to conductors of stores, and to the corps of royal military surveyors and draftsmen, and to all officers and persons who are or shall be serving in the Control Department,[1] and to officers and soldiers serving in the army hospital corps, or the army service corps, and to persons in the War Department, who are or shall be serving with any part of Her Majesty's army at home or abroad, under the command of any commissioned officer, and (subject to and in accordance with the provisions of an Act passed in the sixth and seventh years of the reign of Her present Majesty, chapter ninety-five,) to any out-pensioners of the Royal hospital, Chelsea, who may be called out on duty in aid of the civil[2] power, or for muster or inspection, or who having volunteered their services for that purpose shall be kept on duty in any fort, town, or garrison, and to all civil officers who are or shall be employed by or act under the Secretary of State for War at any of Her Majesty's establishments in the Islands of Jersey, Guernsey, Alderney, Sark, and Man, and the islands thereto belonging, or at foreign stations; —— and all the provisions of this Act shall apply to all persons belonging to Her Majesty's Indian forces who are or shall be commissioned or in pay as officers, or who shall be listed or in pay as non-commissioned officers or soldiers, or who are or shall be serving or hired to be employed in the artillery or any of the trains of artillery, or as master gunners or gunners, or as conductors of stores, or who are or shall be serving in the department of engineers, or in the corps of sappers and miners, or pioneers, or as military surveyors or draftsmen, or in the ordnance or public works or commissariat departments, and to all storekeepers and other civil officers employed under the ordnance, and to all veterinary surgeons, medical storekeepers, apothecaries, hospital stewards, and others serving in the medical department of the said forces, and to all licensed sutlers, and all followers in or of any of the said forces: —— PROVIDED that nothing in this Act

Persons subject to this Act.

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receiving pay "as such," would be liable to the Act. Vol. I. pp. 178-179; Chap. III., par. 35.

[1] Chap. V., par. 15.

[2] No one should be called out as part of the Army to aid the Civil Power without being under the Mutiny Act. The theory that a Soldier comes out as a "Citizen" is wholly untenable; and would lead to serious misapprehension. Vol. II. p. 143.

contained shall extend to affect any security[1] which has been or shall be given by any officers, or their sureties, for the due performance of their respective offices, but that all such securities shall be and remain in full force and effect.

Provisions of this Act to extend to Jersey, Guernsey, &c.

3. THIS Act shall extend to the Islands of Jersey, Guernsey, Alderney, Sark, and Man and the islands[2] thereto belonging, as to the provisions herein contained for enlisting of recruits, whether minors or of full age, and swearing and attesting such recruits, and for mustering and paying, and as to the provisions for the trial and punishment of officers and soldiers who shall be charged with mutiny and desertion, or any other of the offences which are by this Act declared to be punishable by the sentence of a court-martial and also as to the provisions which relate to the punishment of persons who shall conceal deserters, or shall knowingly buy, exchange, or otherwise receive any arms, medals for good conduct or for distinguished or other service, clothes, military furniture, or regimental necessaries from any soldier or deserter, or who shall cause the colour of any such clothes to be changed, or who shall aid in the escape of a prisoner from a military prison, or who shall introduce forbidden articles into such prison, or shall carry out any such articles, or who shall assault any officer of such prison, and also as to the provisions for exempting soldiers from being taken out of Her Majesty's service for not supporting or for leaving chargeable to any parish any wife or child or children, or on account of any breach of contract to serve or work for any employer, or on account of any debts under thirty pounds in the said islands.

Colonial and foreign troops in Her Majesty's pay to be *subject* to provisions of this Act.

4. ALL officers and soldiers of any troops mustered and in pay, which shall be raised and serving in any of Her Majesty's dominions abroad,[3] or in places in possession of or occupied by her Majesty's subjects under the command of any officer having any commission immediately from Her Majesty, shall be subject to the provisions of this Act and of Her

[1] When Financial Civil Officers were turned into Military ones this proviso was needed. See 59 Geo. III. c. 9 s. 139, and Law Officers' and Mr. Harrison's opinions, Vol. I. p. 526.

[2] The Mutiny Act always applied to the Channel Islands so far as relates to mustering and paying the Army, but none of the other powers extended thereto. Nor did the Law Officers, in 1755, think it at all necessary that they should be made to extend to the Islands. Bk. 721, p. 112.

[3] Foreign Troops have usually been raised under the special authority of Parliament, and governed by a Special Code. See the Special Articles of War for the Foreign Troops in 1804, and Note on Foreign Soldiers, Vol. II. p. 431. As to American or Colonial Troops, see Chap. III., *ante*.

Majesty's Articles of War, in like manner as Her Majesty's other forces are; —— and if such officers and soldiers, having been made prisoners,[1] be sent into Great Britain or Ireland, although not allowed to serve therein, all the provisions of this Act in regard to billeting soldiers shall apply to such officers and soldiers.

Provision as to the militia or yeomanry or volunteer corps or reserve forces.

5. NOTHING in this Act contained shall be construed to extend to any militia forces or yeomanry or volunteer corps in Great Britain or Ireland, or to the reserve force provided for by "The Reserve Force Act, 1867," or to the reserve force provided for by "The Militia Reserve Act, 1867,"[2] excepting [only as [3]herein-after enacted, or] where by any Act for regulating any of the said forces or corps the provisions contained in any Act for punishing mutiny and desertion are or shall be specifically made applicable to such forces or corps.

Power to constitute courts-martial.

6. FOR the purpose of bringing offenders against this Act and against the Articles of War to justice, Her Majesty[4] may from time to time, in like manner as has been heretofore used, grant commissions under the Royal Sign Manual[5] for the holding of courts-martial within the United Kingdom of Great Britain and Ireland, and may grant commissions or warrants under the said Royal Sign Manual to the chief governor or governors of Ireland, the commander of the forces, or the person or persons commanding in chief, or commanding for the time being, any body of troops belonging to Her Majesty's army, as well within the United Kingdom of Great Britain and Ireland, and the British Isles, as in any of Her Majesty's garrisons and dominions or elsewhere beyond seas,[6] for convening courts-martial, and for authorising any officer under their respective commands to convene courts-martial, as occasion

[1] This power was first taken during the American War for our Colonists who were captured. See 32 Geo. II. c. 5, s. 75. Foreign Soldiers could not be billeted. See Vol. I. p. 238.

[2] Hitherto this has been a fundamental principle, but how long it may so remain, or be so regarded by Parliament, is difficult to say. It simply refers, for the measure of their liability to the Mutiny Act, to the Code under which each of these Forces is raised. Chap. V., par. 20.

[3] These important words were first inserted in 1872. Compare Mutiny Act, 1871.

[4] By the Mutiny Act 1669 and later Acts, "the General" had this statutory power conferred on him. See Chap. V., par. 10.

[5] The Warrants are always issued under the countersign of a Secretary of State.

[6] This power may be executed by the donee of it in one of two methods:—

1. By convening a Court-martial; or
2. By authorizing a Subordinate Officer under his command to convene such for the trial of those under such last-mentioned Officer.

may require, for the trial of offences committed by any of the forces under the command of any such last-mentioned officer, whether the same shall have been committed before [1] or after such officer shall have taken upon him such command —— PROVIDED that the officer so authorised be not below the degree of a field officer, except in detached situations beyond seas where a field officer is not in command, in which case a captain may be authorised to convene district or garrison courts-martial: Every officer so authorised to convene courts-martial may confirm the sentence of any court-martial convened by him according to the terms of his warrant.[2]

Place where offenders may be tried.

7. ANY person subject to this Act who shall, in any part of Her Majesty's dominions or elsewhere, commit any of the offences for which he may be liable to be tried by court-martial by virtue of this Act or of the Articles of War, may be tried and punished for the same in any part of Her Majesty's dominions or in any other place [3] whereto he may have come or where he may be after the commission of the offence, as if the offence had been committed where such trial shall take place.

Powers of general courts-martial.

8. EVERY general court-martial convened within the United Kingdom or the British Isles shall consist of not less than nine commissioned officers, each of whom shall have held a commission for three [4] years before the date of the assembly of the court. Every general court-martial shall have power to sentence any officer or soldier to suffer death, penal servitude, imprisonment, forfeiture of pay or pension, or any other punishment which shall accord with the usage [5] of the service:—— No sentence of death by a court-martial shall pass unless two-thirds at least of the officers present shall concur therein;——no sentence of penal servitude shall be for a period of less than five years;—— and no sentence of imprisonment shall be for a period longer than two years.

9. EVERY district or garrison court-martial convened within

[1] This was inserted in 1804 by the advice of the Law Officers. Bk. 1, p. 230.

[2] This is a vital principle in the Military Administration of Justice, and the Officer must be careful to follow the terms of his Warrant.

[3] The Reports of Sir Charles Gould and the Law Officers on this Power in 1753, printed in Vol. I. p. 539. Chap. V., pars. 43, 44.

[4] This must be in that Service in which he is then acting as Judge. Thus in the Army or Militia, as he may be sitting in one or other of those Courts.

[5] This relates rather to the measure than the nature of the punishment, which must (I apprehend) accord with the usages of English Law. See Art. 143, *post.*

the United Kingdom or the British Isles shall consist of not less than seven commissioned officers, and shall have the same power as a general court-martial to sentence any soldier to such punishments as shall accord with the provisions of this Act:—PROVIDED always, that no such district or garrison court-martial shall have power to try a commissioned officer, or to pass any sentence of death or penal servitude.

Powers of district or garrison courts-martial.

10. A REGIMENTAL or detachment court-martial shall consist of not less than five commissioned officers, unless it is found to be impracticable[1] to assemble that number, in which case three shall be sufficient, and shall have power to sentence any soldier to corporal punishment, or to imprisonment, and to forfeiture of pay, in such manner as shall accord with the provisions of this Act.

Powers of regimental or detachment courts-martial.

11. IN cases of mutiny, and insubordination accompanied with personal violence, or other offences committed on the line of march, or on board any transport ship, convict ship, merchant-vessel, or troop ship, not in commission, the offender may be tried by a regimental or detachment court-martial, and the sentence may be confirmed and carried into execution on the spot[2] by the officer in the immediate command of the troops, provided that the sentence shall not exceed that which a regimental court-martial is competent to award.

Courts-martial on line of march or in troop ships, &c.

12. IT shall be lawful for any officer commanding any detachment or portion of troops serving in any place beyond seas where it may be found impracticable to assemble a general court-martial, upon complaint[3] made to him of any offence committed against the property or person of any

Powers of detachment general courts-martial.

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[1] In the American Code, where the Court cannot proceed with less than a maximum of members, where "that number can be convened without manifest injury to the Service," the convening decision has been held conclusive, and the proceedings of the Court valid, though a less number be summoned. Martin *v.* Molt, 12 Whea. Rep., pp. 34-35. Chap. VI., par. 10.

[2] This is a Drum-head Court-martial, which on Foreign Service may be conveniently resorted to. The Sentence may be confirmed and carried into execution on the spot, but the measure of Punishment must not exceed that which the Regimental Court can award. Though this Court appears to have been resorted to in the Peninsular War, it was not authorised by the Mutiny Act till 1830. Compare 10 Geo. III. with 11 Geo. IV. c. 74, s. 10; and see 7 Vict. c. 10, s. 10. The resort to such Courts in time of peace would be reprehensible. Vol. II. p. 177 (Note). Chap. V., par. 13, and Chap. VIII., par. 12.

[3] The history of the introduction of this section, in 1814, is given in Vol. II. pp. 662-666, and in Vol. VI. of Wellington Despatches. Chap. III., par. 26, *ante*; Chap. V., par. 13; Chap. VI., par. 14; and Chap. VIII., par. 11.

inhabitant of or resident in any country in which such troops are so serving, by any person serving with or belonging to Her Majesty's armies, being under the immediate command of any such officer, to convene a detachment general court-martial, which shall consist of not less than three commissioned officers, for the purpose of trying any such person;——and every such court-martial shall have the same powers in regard to sentence upon offenders as are granted by this Act to general courts-martial:——PROVIDED always, that no sentence of any such court-martial shall be executed until the general commanding the army of which such detachment or portion forms part shall have approved and confirmed the same.

As to swearing and summoning of witnesses.

13. ALL general and other courts-martial shall administer an oath to every witness or other person who shall be examined before such court[1] in any matter relating to any proceeding before the same;——and every person, as well civil as military, who may be required to give or produce evidence before a court-martial, shall, in the case of general courts-martial, be summoned by the judge advocate general, or his deputy, or the person officiating as judge advocate, and in the case of all other courts-martial by the president of the court;——and all persons so summoned and attending as witnesses before any court-martial shall,[2] during their necessary attendance in or on such courts, and in going to and returning from the same, be privileged from arrest, and shall, if unduly arrested, be discharged by the court out of which the writ or process issued by which such witness was arrested;——or if such court be not sitting, then by any judge of the superior courts of Westminster or Dublin or of the Court of Session in Scotland, or of the courts of law in the East or West Indies, or elsewhere, according as the case shall require, upon its being made to appear to such court or judge, by any affidavit in a summary way, that such witness was arrested in going to or attending upon or returning from such court-martial;——and all witnesses so duly summoned as aforesaid who shall not attend on such courts, or attending shall refuse to be sworn, or being sworn shall refuse to give evidence, or not produce the documents under their power or control required to be produced by them, or to answer all such questions as the court may legally demand of them,

[1] Before the full Court, not a "deputation" of one or two members to take evidence.

[2] These (like others) witnesses (before other Courts) are entitled to their reasonable expenses in going to or from, or remaining at, the place of trial. The Home Office scale for the Witnesses at Civil Criminal trials is usually adopted by the War Office. As to the section generally, see Chap. VI, pars. 47 and 49.

shall be liable to be attached in the Court of Queen's Bench in London or Dublin, or in the Court of Session or sheriff or stewart, courts in Scotland, or in courts of law in the East or West Indies, or in any of Her Majesty's colonies, garrisons, or dominions in Europe or elsewhere respectively, upon complaint made, in like manner as if such witness, after having been duly summoned or subpœnaed, had neglected to attend upon a trial in any proceeding in the court in which such complaint shall be made —— PROVIDED always, that nothing in this Act contained shall be construed to render an oath necessary in any case where by law a solemn affirmation may be made instead thereof:——IT shall be lawful for the president of any court-martial to administer an oath to a shorthand writer to take down according to the best of his power the evidence to be given before the court.

Oath to be administered to shorthand writer.

14. NO officer or soldier who shall be acquitted or convicted of any offence shall be liable to be tried[1] a second time by the same or any other court-martial for the same offence; ——and no finding, opinion, or sentence given by any court-martial, and signed by the president thereof, shall be revised more than once, nor shall any additional evidence in respect of any charge on which the prisoner then stands arraigned be received by the court on any revision.

No second trial for the same offence, but reversion may be allowed.

15. IF any person subject to this Act[2] shall at any time during the continuance of this Act begin, excite, cause, or join in any mutiny or sedition in any forces belonging to Her Majesty's army, or Her Majesty's royal marines, or shall not use his utmost endeavours to suppress the same, or shall conspire with any other person to cause a mutiny, or coming to the knowledge of any mutiny or intended mutiny shall not, without delay, give information thereof to his commanding officer; —— or shall hold correspondence with or give advice or intelligence to any rebel or enemy of Her Majesty, either by letters, messages, signs, or tokens, in any manner or way whatsoever; —— or shall treat or enter into any terms with such rebel or enemy without Her Majesty's license,

Crimes punishable with death.

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[1] The words, "tried a second time for the same offence," must be noted. The rule of ordinary Criminal Justice is, "that no man be brought into jeopardy more than once for the same offence," Rex *v.* Taylor, 3 Bar. and Cres., p. 502. If the first be not a trial completed, the plea would not (I apprehend) avail. Winsor *v.* The Queen 6 B. & S., p. 143, and 7 Ib., p. 491. As to the history of the section see Vol. I. pp. 165-167, and Vol. II. p. 361; Chap. III., par. 3, *ante*; and Chap. VI., pars. 45 to 75.

[2] Compare this section with section 1 of the Mutiny Act, 1716, Appendix A, *ante*.

or license of the general or chief commander; —— or shall misbehave himself before the enemy; —— or shall shamefully abandon or deliver up any garrison, fortress, post, or guard committed to his charge, or which he shall have been commanded to defend; —— or shall compel the governor or commanding officer of any garrison, fortress, or post to deliver up to the enemy or to abandon the same; —— or shall speak words or use any other means to induce such governor or commanding officer, or others, to misbehave before the enemy, or shamefully to abandon or deliver up any garrison, fortress, post, or guard committed to their respective charge, or which he or they shall be commanded to defend; —— or shall desert Her Majesty's service; —— or shall leave his post before being regularly relieved; —— or shall sleep on his post; —— or shall strike or shall use or offer any violence against his superior officer, being in the execution[1] of his office, or shall disobey any lawful command of his superior officer;[2] —— or who being confined in a military prison shall offer any violence against a visitor or other his superior military officer, being in the execution of his office; ——all and every person and persons so offending in any of the matters before mentioned, whether such offence be committed within this realm or in any other of Her Majesty's dominions, or in foreign parts, upon land or upon the sea, shall suffer death, or penal servitude; —— or such other punishment as by a court-martial[3] shall be awarded: —— PROVIDED always, that any non-commissioned officer or soldier attested for or in pay in any regiment or corps who shall, without having first obtained a regular discharge[4] therefrom, enlist himself in Her Majesty's army, may be deemed to have deserted Her Majesty's service, and shall be liable to be punished accordingly.

Judgment of death may be commuted for penal servitude or other punishments.

16. IN all cases where the punishment of death shall have been awarded by a general court-martial or detachment general court-martial it shall be lawful for Her Majesty, or, if in any place out of the United Kingdom or British Isles, for the commanding officer having authority to confirm the sentence, instead of causing such sentence to be carried into execution, to order the offender to be kept in penal

[1] The history of this paragraph, introduced in 1728, is found in the letters, &c., printed Vol. I. pp. 511-515. "Murder" would not be triable under this section, but under the Homicide Act, 1862. See Vol. I. p. 207, and Vol. II. pp. 147-153.

[2] Chap. III., pars. 31, 32.

[3] This discretion cannot be taken from the Court except by the authority of Parliament, Vol. I. p. 518. The *King v.* Suddis, 1 East. Rep., p. 310.

[4] This principle is as old as the Mutiny Act, but this proviso was inserted in 1783.

servitude[1] for any term not less than five years, or to suffer such term of imprisonment, with or without hard labour, and with or without solitary confinement, as shall seem meet to Her Majesty, or to the officer commanding as aforesaid.

Embezzlement, &c., of stores punishable by penal servitude, or by fine, imprisonment, &c.

17. ANY officer or soldier of Her Majesty's army, or any person employed in the War Department, or in any way concerned in the care or distribution of any money, provisions, forage, arms, clothing, ammunition, or other stores belonging to Her Majesty's army or for Her Majesty's use, who shall embezzle,[2] fraudulently misapply, wilfully damage, steal, or receive the same, knowing them to have been stolen, or shall be concerned therein or connive thereat, may be tried for the same by a general court-martial, and sentenced to be kept in penal servitude for any term not less than five years, or to suffer such punishment of fine, imprisonment, with or without hard labour, dismissal from Her Majesty's service, reduction to the ranks if a warrant or non-commissioned officer, as such court shall think fit, according to the nature and degree of the offence; —— and every such offender shall, in addition to any other punishment, make good at his own expense the loss and damage sustained, and in every such case the court is required to ascertain by evidence the amount of such loss or damage, and to declare by their sentence that such amount shall be made good by such offender; and the loss and damage so ascertained as aforesaid shall be a debt to Her Majesty, and may be recovered in any of Her Majesty's courts at Westminster or in Dublin, or the Court of Exchequer in Scotland, or in any court in Her Majesty's colonies, or in India, where the person sentenced by such court-martial shall be resident, after the said judgment shall be confirmed and made known, or the offender, if he shall remain in the service, may be put under stoppages not exceeding one-half[3] of his pay and allowances until the amount so ascertained shall be recovered.

18. WHENEVER Her Majesty shall intend that any sentence of

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[1] As to the necessity for this Statutory Power, which was first given in 1728, see Reports of Lord Hardwicke (then Sir P. Yorke), Vol. I. pp. 509-514. The section was amended in 43 Geo. III. c. 20 s. 4. Chap. III., par. 8; Chap. VII., par. 16.

[2] Embezzlement of public stores, &c., was a Military offence, by the earlier Articles of War (See s. 13 Art. 1 of 1749), and in 1809-1810 these sections were brought into the Mutiny Act. See Vol. I. pp. 181-182.

[3] The same limit existed in 1749, but the Soldier could be imprisoned or whipped as a punishment.

penal [1] servitude heretofore or hereafter passed upon any offender by any court-martial shall be carried into execution for the term specified in such sentence or for any shorter term, or shall be graciously pleased to commute as aforesaid to penal servitude any sentence of death passed by any such court, the sentence, together with Her Majesty's pleasure thereupon, shall be notified in writing by the officer commanding in chief Her Majesty's army in Great Britain and Ireland, or by the adjutant-general, or by the Secretary of State for the War Department, to any judge of the Queen's Bench, Common Pleas, or Exchequer in England or Ireland, and thereupon such judge shall make an order for the penal servitude of such offender in conformity with such notification, and shall do all such other acts consequent upon such notification as such judge is authorised to do by any Act in force touching the penal servitude of other offenders; —— and it shall be lawful for any judge of the Queen's Bench, Common Pleas, or Exchequer in Ireland to make an order that any such offender convicted in Ireland shall be kept in penal servitude in England; —— and such order shall be in all respects as effectual in England as though such offender had been convicted in England, and the order had been made by any judge of the Queen's Bench, Common Pleas, or Exchequer in England; —— and the person in whose custody such offender shall at that time be, and all other persons whatsoever whom the said order may concern, shall be bound to obey and shall be assistant in the execution thereof, and shall be liable to the same punishment for disobedience to or for interrupting the execution of such order as if the order had been made under the authority of any such Act as aforesaid; —— and every person so ordered to be kept in penal servitude shall be subject to every provision made by law and in force concerning persons under sentence of penal servitude; —— and from the time when such order of penal servitude shall be made every Act in force touching the escape of felons, or their afterwards returning or being at large without leave, shall apply to such offender, and to all persons aiding and abetting, contriving or assisting in any escape or intended escape or returning without leave of any such offender; —— and the judge who shall make any order of penal servitude as aforesaid shall direct the notification of Her Majesty's pleasure, and his own order made thereupon, to be filed and kept of record in the office of the clerk of the Crown of the Court of Queen's Bench; —— and the said clerk shall have a fee of two shillings and six-

As to execution of sentences of penal servitude in the United Kingdom.

[1] This section, as applicable to transportation, was inserted in 1803. See 43 Geo. III. c. 20, ss. 5-9; and 7 & 8 Geo. IV. c. 63.

pence only for filing the same, and shall, on application, deliver a certificate in writing (not taking more than two shillings and sixpence for the same) to such offender or to any person applying in his or Her Majesty's behalf, showing the christian and surname of such offender, his offence, the place where the court was held before which he was convicted, and the conditions on which the order of penal servitude was made; —— which certificate shall be sufficient proof of the conviction and sentence of such offender, and also of the terms on which such order for his penal servitude was made, in any court and in any proceeding wherein it may be necessary to inquire into the same.

As to execution of sentences of penal servitude in the colonies, India, or elsewhere out of Her Majesty's dominions.

19. WHENEVER any sentence of penal servitude heretofore or hereafter passed upon any offender by any court-martial holden in any part of Her Majesty's foreign dominions, or elsewhere beyond the seas, is to be carried into execution for the term specified in such sentence or for any shorter term, or when sentence of death, passed by any such court-martial, has been or shall as aforesaid be commuted to penal servitude, the same shall be notified by the officer commanding Her Majesty's forces at the presidency or station where the offender may come or be, or in his absence by the adjutant-general for the time being, if in India, to the chief judge or any judge of the chief civil court of the presidency or province where the offender may come or be, and if in any other part of Her Majesty's dominions to the chief justice or some other judge therein, and such judge shall make order for the intermediate custody and penal servitude of such offender; and the offender shall, until handed over in pursuance of any such order to the civil authorities, be detained in military custody, and may be moved in such custody from place to place as circumstances may require; —— and upon any such order being made it shall be duly notified to the governor of the presidency if in India, or to the governor of the colony if in any of Her Majesty's colonies, or to the person who shall for the time being be exercising the office of governor of such presidency or colony, who, on receipt of such notification, shall cause such offender to be removed or sent to some other colony or place, or to undergo his sentence within the presidency or colony where the offender was so sentenced, or where he may come or be as aforesaid, in obedience to the directions for the removal and treatment of convicts which shall from time to time be transmitted from Her Majesty through one of Her Principal Secretaries of State to such presidency or colony; —— and such offender shall according to such directions undergo the sentence of penal servitude

which shall have been passed upon him either in the presidency or colony in which he has been so sentenced, or in the colony or place to which he has been so removed or sent, and whilst such sentence shall remain in force shall be liable to be imprisoned, and kept to hard labour, and otherwise dealt with under such sentence in the same manner as if he had been sentenced to be imprisoned with hard labour, during the term of his penal servitude, by the judgment of a court of competent jurisdiction in such presidency or colony, or in the colony or place to which he has been so removed or sent respectively: —— AND elsewhere out of Her Majesty's dominions the officer commanding shall have power to make an order in writing for the penal servitude or intermediate custody of such offender; —— and such offender shall be liable by virtue of such order to be imprisoned and kept to hard labour and otherwise dealt with under the sentence of the court in the same manner as if he had been sentenced to be imprisoned with hard labour during the term of his penal servitude by the judgment of a court of competent jurisdiction, in the place where he may be ordered to be kept in such intermediate custody, or in the place to which he may be removed for the purpose of undergoing his sentence of penal servitude. —— IF any prisoner shall be brought to any place in the United Kingdom, there to undergo any sentence of penal servitude which has been passed upon him by a court-martial held elsewhere, and the judge's or officer's order hereinbefore prescribed for his penal servitude and intermediate custody shall not be forthcoming, and the judge-advocate-general, upon application for that purpose, shall certify that it appears from the original proceedings of the court-martial whereby the prisoner was tried that he has been duly sentenced to penal servitude, and that for anything that appears to the contrary thereon such sentence is still in force against the said prisoner for the period to be stated in such certificate, then it shall be lawful for one of Her Majesty's Principal Secretaries of State, upon consideration of such certificate, to direct in writing under his hand that the said prisoner shall be at once removed to a convict prison, and be imprisoned and kept to hard labour according to the sentence stated in such certificate, and thereupon the prisoner shall be removed to such convict prison, and shall be liable to be imprisoned and kept to hard labour, and be otherwise dealt with during the term of his sentence, as if he had been sentenced to a like term of penal servitude by a competent court in the United Kingdom.[1]

[1] This section came under consideration in *Re* Allen, 3 Ell. and Ell., p. 356. Where a man is sentenced there he must receive his punishment of imprisonment, unless statutory authority for his removal be given.

A sentence of penal servitude may be commuted for imprisonment, &c.

20. IN any case where a sentence of penal servitude shall have been awarded by a general or detachment general court-martial it shall be lawful for Her Majesty, or, if in any place out of the United Kingdom or British Isles, for the officer commanding in chief Her Majesty's forces there serving, instead of causing such sentence to be carried into execution,[1] to order that the offender be imprisoned, with or without hard labour, and with or without solitary confinement, for such term not exceeding two years as shall seem meet to Her Majesty, or to the officers commanding as aforesaid.

Of forfeitures, when combined with penal servitude.

21. WHERE an award of any forfeiture, or of deprivation of pay, or of stoppages of pay, shall have been added to any sentence of penal servitude, it shall be lawful for Her Majesty,[2] or, if in any place out of the United Kingdom or British Isles, for the officer commanding in chief Her Majesty's forces there serving, in the event of the sentence being commuted for imprisonment, to order such award of forfeiture, deprivation of pay, or stoppages of pay to be enforced, mitigated, or remitted, as may be deemed expedient.

Courts-martial may not sentence to corporal punishment in time of peace.

22. NO court-martial[3] shall, for any offence whatever committed under this Act during the time of peace within the Queen's dominions, have power to sentence any soldier to corporal punishment; provided, that any court-martial may sentence any soldier to corporal punishment while on active service in the field, or on board any ship not in commission, for mutiny, insubordination, desertion, drunkenness on duty or on the line of march, disgraceful conduct, or any breach of the Articles of War; and no sentence of corporal punishment shall exceed fifty lashes.

Power to inflict corporal punishment and imprisonment.

23. IT shall be lawful for any general, district, or garrison court-martial, in addition to any sentence of corporal punishment, to award imprisonment,[4] with or without hard labour, and with or without solitary confinement, such confinement not exceeding the periods prescribed by the Articles of War.

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[1] See note on s. 16, *ante*.

[2] This duty would be within the legal competency of the Crown to discharge without statutory authority.

[3] This limitation applies to the power of a "Court-martial" only, and not to any power which other authorities may have over a prisoner under the Prison Act.

[4] This section was inserted in the Mutiny Act of 1825.

24. IN all cases in which corporal punishment shall form the whole or part of the sentence awarded by any court-martial it shall be lawful for Her Majesty, or for the general or other officer authorised to confirm the sentences of courts-martial, to commute[1] such corporal punishment to imprisonment for any period not exceeding forty-two days, with or without hard labour, and with or without solitary confinement, or to mitigate such sentence, or instead of such sentence, to award imprisonment for any period not exceeding twenty days, with or without hard labour, and with or without solitary confinement and corporal punishment, to be inflicted in the prison, not exceeding twenty-five lashes, and the solitary confinement hereinbefore mentioned shall in no case exceed seven days at a time, with intervals of not less than seven days between each period of such confinement.

Power to commute corporal punishment for imprisonment, &c.

25. IT shall be lawful for Her Majesty[2] in all cases whatsoever, instead of causing a sentence of cashiering to be put in execution, to order the offender to be reprimanded, or, in addition thereto, to suffer such loss of army or regimental rank, or both, as may be deemed expedient.

Power to commute a sentence of cashiering.

26. A GENERAL, garrison, or district court-martial may sentence any soldier to imprisonment, with or without hard labour, and with or without solitary confinement, but such solitary confinement shall not exceed the periods prescribed by the Articles of War.

Power of imprisonment by general, garrison, or district courts-martial.

27. ANY regimental or detachment court-martial may sentence any soldier to imprisonment, with or without hard labour, for any period not exceeding forty-two days, and with or without solitary confinement not exceeding the periods prescribed by the Articles of War.

Power of imprisonment by regimental or detachment courts-martial.

28. WHENEVER sentence shall be passed by a court-martial on an offender already under sentence either of imprisonment or of penal servitude, the court may award a sentence of imprisonment or penal servitude for the offence for which he is under trial, to commence at the expiration of the imprisonment or penal servitude to which he shall have been so previously sentenced, although the aggregate of the terms of

As to imprisonment of offenders already under sentence.

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[1] See note on sec. 16, *ante*.

[2] It is difficult to reconcile this section (first inserted in 1860) with any legal principle under which the authority of the Crown over the Army is upheld. Re Mansergh 1 B. and S., p. 400, and Vol. II. pp. 118-123.

imprisonment or penal servitude respectively may exceed the term for which any of those punishments could be otherwise awarded. ——WHENEVER Her Majesty, or any general or other officer authorised to confirm the sentences of courts-martial, shall commute a sentence of penal servitude or corporal punishment to imprisonment, and the offender whose sentence shall be so commuted shall, at the time of such commutation, be under sentence of imprisonment or penal servitude, it shall be lawful for Her Majesty, or the general or other officer who shall so commute such sentence, to direct that such commuted sentence of imprisonment shall commence at the expiration of the imprisonment or penal servitude to which such prisoner shall have been so previously sentenced, although the aggregate of the term of imprisonment or penal servitude respectively may exceed the term for which any of those punishments could be otherwise awarded.

Regulations as to military prisons.

29. IT shall be lawful for the Secretary of State for the War Department, and in India for the Governor General in council, to set apart any buildings[1] now erected or which may hereafter be erected, or any part or parts thereof, as military prisons, and to declare that any building or any two or more buildings shall be, and thenceforth such building or buildings shall be deemed and taken to be, a military prison;—— and every military prison which, under the provisions of any former Act of Parliament, has been or which shall be so as aforesaid set apart and declared, shall be deemed to be a public prison within the meaning of this Act; —— and all and every the powers and authorities with respect to county gaols or houses of correction which now are or which may hereafter be vested in any of Her Majesty's Principal Secretaries of State shall, with respect to all such military prisons, belong to and may be exercised by the Secretary of State for the War Department, and in India by the Governor General in council; —— and it shall be lawful for the said Secretary of State, and in India for the Governor General in council, from time to time to make, alter, and repeal rules and regulations for the government and superintendence of any such military prison, and of the governor, provost marshal, officers, and servants thereof, and of the offenders confined therein, which said rules and regulations so made as aforesaid shall remain and continue to be in force until the same are altered or repealed by Her Majesty's said Secretary of State for War, or in India by the Governor General in council; —— and it shall be lawful for the said Secretary of State, and in India for the

[1] This section was first inserted in 1844. See note "as to Military Prisons," Vol. I. p. 405.

Governor General in council, from time to time to appoint an inspector general and inspectors of military prisons, and a governor or provost marshal, and all other necessary officers and servants, for any such military prison, and, as occasion may arise, to remove the governor or provost marshal, officer, or servant of any such military prison; —— and the general or other officer commanding any district or station within which may be any such military prison, or such general or other officer, and such other person or persons as the said Secretary of State, and in India the Governor General in council, may from time to time appoint, shall be a visitor or visitors of such prison; —— and the said Secretary of State, and in India the Governor General in council, may authorise any general officer commanding to appoint periodically visitors to any military prison within his command; —— and the said Secretary of State, and in India the Governor General in council, or the general officer so appointing, shall transmit to the visitor or visitors of every military prison established by his authority a copy of the rules and regulations which are to be observed and enforced, and the same shall accordingly be observed and enforced, within such prison; —— and every inspector, visitor, and governor of any such military prison shall, subject to such rules and regulations as may from time to time be made by the said Secretary of State, or in India by the Governor General in council, have and exercise in respect of such prison, and of the governor, officers, and servants thereof, and of the prisoners confined therein, all the powers and authorities, as well in respect of administering oaths as otherwise, which any inspector, visiting justice, or governor of a county gaol or house of correction may respectively exercise as such: —— PROVIDED that every inspector of such military prisons, who is also a director of convict prisons shall have the same power in such military prisons as he has in convict prisons.

As to the custody of military offenders under sentence of court-martial and in other cases.

30. EVERY governor, provost marshal, gaoler, or keeper of any public[1] prison or of any goal or house of correction in any part of Her Majesty's dominions shall receive into his custody any military offender under sentence of imprisonment by a court martial, upon delivery to him of an order in writing in that behalf from the general commanding in chief, or the adjutant general, or the officer who confirmed the proceedings of the court, or the officer commanding the regiment or corps to which the offender belongs or is

[1] This and other sections were inserted in consequence of imprisonment being substituted for whipping, in 1812. See 52 Geo. III. c. 22, ss. 23-24.

attached, which order shall specify the offence of which he shall have been convicted, and the sentence of the court, and the period of imprisonment which he is to undergo, and the day and hour of the day on which he is to be released; —— and such governor, provost marshal, gaoler, or keeper shall keep such offender in a proper place of confinement, with or without hard labour, and with or without solitary confinement, according to the sentence of the court, and during the time specified in the said order, or until he be discharged or delivered over to other custody before the expiration of that time under an order duly made for that purpose; —— and whenever troops are called out in aid of the civil power, or are stationed in billets, or are on the line of march, every governor, provost marshal, gaoler, or keeper of any public prison, gaol, house of correction, lock-up house, or other place of confinement, shall receive into his custody any soldier for a period not exceeding seven days, upon delivery to him of an order in writing on that behalf from the officer commanding such troops.

As to the removal or discharge of prisoners in certain cases.

31. IN the case of a prisoner undergoing imprisonment under the sentence of a court-martial in any public prison other than the military[1] prisons set apart by the authority of this Act, or in any gaol or house of correction in any part of the United Kingdom, it shall be lawful for the general commanding in chief, or the adjutant general, or the officer who confirmed the proceedings of the court, or the officer commanding the district or garrison in which such prisoner may be, to give, as often as occasion may arise, an order in writing directing that the prisoner be discharged, or be delivered over to military custody, whether for the purpose of being removed to some other prison or place in the United Kingdom, there to undergo the remainder or any part of his sentence, or for the purpose of being brought before a court-martial either as a witness or for trial; —— and in the case of a prisoner undergoing imprisonment or penal servitude under the sentence of a court-martial in any public prison other than such military prison as aforesaid, or in any gaol or house of correction in any part of Her Majesty's dominions other than the United Kingdom, it shall be lawful for the general commanding in chief or the adjutant general of Her Majesty's forces in the case of any such prisoner, and for the Commander-in-Chief in India in the case of any prisoner so confined in any part of Her Majesty's Indian dominions, and for the general commanding in chief in any presidency in India in the case of a prisoner so therein confined,

[1] This was amended in 1861. *Re* Allen, 3 Ell. and Ell., p. 356.

and for the officer commanding in chief or the officer who confirmed the proceedings of the court at any foreign station in the case of a prisoner so there confined, to give, as often as occasion may arise, an order in writing directing that the prisoner be discharged or be delivered over to military custody, whether for the purpose of being removed to some other prison or place in any part of Her Majesty's dominions, there to undergo the remainder or any part of his sentence, or for the purpose of being brought before a court-martial either as a witness or for trial; —— and in the case of any prisoner who shall be removed by any such order from any such prison, gaol, or house of correction either within the United Kingdom or elsewhere to some other prison or place either in the United Kingdom or elsewhere, the officer who gave such order shall also give an order in writing directing the governor, provost marshal, gaoler, or keeper of such other prison or place to receive such prisoner into his custody, and specifying the offence of which such prisoner shall have been convicted, and the sentence of the court and the period of imprisonment which he is to undergo, and the day and the hour on which he is to be released; —— and such governor, provost marshal, gaoler, or keeper shall keep such offender in a proper place of confinement, with or without hard labour, and with or without solitary confinement, according to the sentence of the court, and during the time specified in the said order or until he be duly discharged or delivered over to other custody before the expiration of that time under an order duly made for that purpose; —— and in the case of a prisoner undergoing imprisonment or penal servitude under the sentence of a court-martial in any military prison in any part of Her Majesty's dominions, the Secretary of State for the War Department, or the general officer commanding the district or station in which the prison may be situated, shall have the like powers in regard to the discharge and delivery over of such prisoners to military custody as may be lawfully exercised by any of the military authorities above mentioned in respect of any prisoners undergoing confinement as aforesaid in any public prison other than a military prison, or in any goal or house of correction in any part of Her Majesty's dominions; —— and such prisoner, in any of the cases herein-before mentioned, shall accordingly, on the production of any such order as is herein-before mentioned, be discharged or delivered over, as the case may be: —— PROVIDED always, that the time during which any prisoner under sentence of imprisonment by a court-martial shall be detained in such military custody under such order as aforesaid shall be reckoned as imprisonment under the sentence for whatever purpose such detention shall take place; —— and such prisoner may during such time, either when on board

ship or otherwise, be subjected to such restraint as is necessary for his detention and removal.

Provision for subsistence.

32. THE gaoler or keeper of any public prison, gaol, house of correction, lock-up house, or other place of confinement in any part of Her Majesty's dominions, shall diet and supply every soldier imprisoned therein under the sentence of a court-martial or as a deserter with fuel and other necessaries according to the regulations of such place of confinement, and shall receive on account of every soldier, out of the subsistence of such soldier, during the period of his imprisonment, in Great Britain and Ireland, one shilling per diem, and in other parts of Her Majesty's dominions sixpence per diem:——IN all cases where such soldier is sentenced to be discharged from the army on the completion of his term of imprisonment, the Secretary of State for the War Department may cause to be issued out of army votes, upon application in writing, signed by any justice[1] within whose jurisdiction such place of confinement shall be locally situated, together with a copy of the order of commitment, a further sum not exceeding sixpence per diem, and which said sum of one shilling or of sixpence, and the further sum, if any, as the case may be, shall be carried to the credit of the fund from which the expense of such place of confinement is defrayed.——A SENTENCE of imprisonment or of penal servitude passed either by a court-martial or by any court of criminal jurisdiction upon any person subject to this Act, shall be in no respect affected by such person ceasing to be subject to this Act by discharge or otherwise at any time:——PROVIDED that for each person so ceasing to be subject to this Act the Secretary of State for the War Department may cause to be issued out of army votes, upon application in writing, signed by any justice as aforesaid, together with a copy of the order of commitment, a sum not exceeding one shilling and sixpence per diem, which said sum shall be carried to the credit of the fund from which the expense of such place of confinement is defrayed.

IN India the expenses incurred under the provisions of this section shall be paid in the same manner as the other expenses of such prison, or as may be provided by the laws or regulations to be made in that behalf.

33. EVERY gaoler or keeper of any public prison, gaol, house of

[1] This section is thought to be a County grievance. In February 1673-1674, the deduction was 4*d.*; on September, 1st, 1801, 9*d.*; on the 12th March, 1822, 6*d.*; in 1860, 1*s.* The section has been discussed in Parliament at 22 H. D. (O.S.), pp. 29 and 144; ib. (3), p. 2369.

correction, or other place of confinement, to whom any notice shall have been given, or who shall have reason to know or believe, that any person in his custody for any offence, civil or military, is a soldier liable to serve Her Majesty on the expiration of his imprisonment, shall forthwith,[1] or as soon as may be, give, if in Great Britain to the Secretary of State for the War Department, and if in Ireland to the general commanding Her Majesty's forces in Ireland, or if in India to the adjutant general of the army, or to the nearest military authority with whom it may be convenient to communicate, notice of the day and hour on which the imprisonment of such person will expire; and every such gaoler or keeper is hereby required to use his best endeavours to ascertain and report in all cases where practicable the particular regiment or corps, battalion of a regiment or battery of artillery, to which such soldier belongs, and also whether he belongs to the depôt or the head quarters of his regiment; and in the event of his being a recruit who has not joined, that it may be so stated in his report, together with the name of the place where the man enlisted. —— IN all cases where the soldier in custody is under sentence to be discharged from the service on the completion of his term of imprisonment, and the discharge document is in the hands of the gaoler, such gaoler shall not be required to make any report thereof to the Secretary of State for War, or to the military authorities herein-before referred to.

Expiration of imprisonment of soldiers in common gaols.

34. UPON reasonable suspicion that a person is a deserter it shall be lawful for any constable,[2] or if no constable can be immediately met with, then for any officer or soldier in Her Majesty's service, or other person, to apprehend or cause to be apprehended such suspected person, and forthwith to bring him or cause him to be brought before any justice[3] living in or near the place where he was so apprehended and acting for the county, city, district, place, or borough wherein such place is situate or for the county adjoining such first-mentioned county or such borough; —— and such justice is hereby authorised and required to inquire whether such suspected person is a deserter,[4]

Apprehension of deserters in the United Kingdom.

[1] First introduced by 52 Geo. III. c. 22, s. 92.

[2] This is a very old section, and involves an important principle. See Chap. V., par. 41, Vol. II. pp. 17 and 47, and the case of Wolton *v.* Gavin, 16 Q. B. Rep., p. 90.

[3] This is for the protection of the accused. Any Justice could punish desertion wherever the offence was committed according to 3 Cok. Inst., p. 86.

[4] This word formerly stood as "Soldier," which excluded an "Officer" from the operation of this section. See Re Douglass 3 Q. B. Rep., p. 830. In the Mutiny Act, 1846, the word now found was inserted. See 9 Vic. c. 11, s. 22.

and from time to time to defer the said inquiry and to remand the said suspected person in the manner prescribed by an Act passed in the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-two, section twenty-one, and subject to every provision therein contained; and if it shall appear to the satisfaction of such justice, by the testimony of one or more witnesses taken upon oath, or by the confession of such suspected person, confirmed by some corroborative evidence upon oath or by the knowledge of such justice, that such suspected person is a deserter, such justice shall forthwith cause him to be conveyed in civil custody[1] to the head quarters or depôt of the regiment or corps to which he belongs, if stationed within a convenient and easily accessible distance from the place of commitment, or if not so stationed then to the nearest or most convenient public prison (other than a military prison set apart under the authority of this Act) or police station legally provided as a lock-up house for temporary confinement of persons taken into custody, whether such prison or police station be in the county or borough in which such suspected person was apprehended or in which he was committed, or not; —— or if the deserter has been apprehended by a party of soldiers of his own regiment or corps in charge of a commissioned officer, such justice may deliver him up to such party, unless the officer shall deem it necessary to have the deserter committed to prison for safe custody; —— and such justice shall transmit an account of the proceedings, in the form prescribed in the schedule annexed to this Act, to the Secretary of State for the War Department, specifying therein whether such deserter was delivered to his regiment or corps, or to the party of his regiment or corps, in order to his being taken to the head quarters or depôt of his regiment or corps, or whether such deserter was committed to prison, to the end that the person so committed may be removed by an order from the office of the said Secretary of State, and proceeded against according to law; —— and such justice shall also send to the said Secretary of State a report stating the names of the persons by whom or by or through whose means the deserter was apprehended and secured; —— and the said Secretary of State shall transmit to such justice an order for the payment to such persons of such sum not exceeding forty[2] shillings as the said Secretary of State shall be satisfied they are entitled to according to the true intent and meaning of this Act; —— and for such informa-

[1] At the expense of the County. See King *v.* Pearce, 3 M. and Sel., p. 63, and 14 Parl. Hist., pp. 453-454.

[2] 20*s.* in 1812. but raised to 40*s.* by Order of 8 June, 1812. Comparo Section 117 of Mutiny Act, 1822, with 116 of 1823.

tion, commitment, and report as aforesaid the clerk of the said justice shall be entitled to a fee of two shillings and no more; —— and every gaoler and other person into whose custody any person charged with desertion is committed shall immediately upon the receipt of the person so charged into his custody pay such fee of two shillings, and also upon the production of a receipt from the medical practitioner who, in the absence of a military medical officer, may have been required to examine such suspected person, a fee of two shillings and sixpence, and shall notify the fact to the Secretary of State for the War Department, and transmit also to the said Secretary of State a copy of the commitment, to the end that such Secretary of State may order repayment of such fees; —— and when any such person shall be apprehended and committed as a deserter in any part of Her Majesty's foreign dominions the justice shall forthwith cause him to be conveyed to some public prison, if the regiment or corps to which he is suspected to belong shall not be in such part, or, if the regiment or corps be in such part, the justice may deliver him into custody at the nearest military post if within reasonable distance, although the regiment to which such person is suspected to belong may not be stationed at such military post; —— and such justice shall in every case transmit to the general or other officer commanding a descriptive return in the form prescribed in the schedule to this Act annexed, to the end that such person may be removed by order of such officer, and proceeded against according to law; —— and such descriptive return, purporting to be duly made and subscribed in accordance with the Act, shall, in the absence of proof to the contrary, be deemed sufficient evidence of the facts and matters therein stated: —— PROVIDED always that any such person so committed as a deserter in any part of Her Majesty's dominions shall, subject to the provisions herein-after contained, be liable to be transferred by order of the general or other officer commanding to serve in any regiment or corps or depôt nearest to the place where he shall have been apprehended, or to any other regiment or corps to which it may be desirable that he should be transferred, and shall also be liable after such transfer of service to be tried and punished as a deserter.

In Her Majesty's foreign dominions.

Transfer of deserters.

35. EVERY[1] gaoler or keeper of any public prison, gaol, house of correction, lock-up house, or other place of confinement in any part of Her Majesty's dominions, is hereby required to receive and confine therein every deserter who shall be delivered into his custody by any soldier or other person

As to the temporary custody of deserters in gaols.

[1] Amended in 1809.

conveying such deserter under lawful authority, on production of the warrant of the justice of the peace on which such deserter shall have been taken, or some order from the office of the Secretary of State for the War Department, which order shall continue in force until the deserter shall have arrived at his destination; and such gaoler or keeper shall be entitled to one shilling for the safe custody of the said deserter while halted on the march, and to such subsistence for his maintenance as shall be directed by Her Majesty's regulations.

Desertion of recruits prior to joining their regiments or corps.

36. ANY recruit for Her Majesty's army who, having been attested or received pay other than enlisting money, shall desert before joining the regiment or corps for which he has enlisted, shall, on being apprehended, and committed for such desertion by any justice of the peace upon the testimony of one or more witnesses upon oath, or upon his own confession, forfeit his personal bounty, and be liable to be transferred to any regiment or corps or depôt nearest to the place where he shall have been apprehended, or to any other regiment or corps to which Her Majesty may deem it more desirable that he should be transferred: —— PROVIDED always, that such deserters thus transferred shall not be liable to other punishment for the offence, or to any other penalty except the forfeiture of their personal bounty.

Fraudulent confession of desertion.

37. ANY person who shall confess[1] himself to be a deserter from Her Majesty's forces, or from the embodied militia, shall be liable to be taken before any two justices of the peace acting for the county, district, city, burgh, or place where any such person shall at any time happen to be when he shall be brought before them, and on proof that any such confession as aforesaid was false, shall by the said justices be adjudged to be punished, if in England as a rogue and vagabond, and if elsewhere by commitment to some prison or house of correction, there to be kept to hard labour for any time not exceeding three calendar months; —— and if, when such person shall be brought before the said justices, it shall be proved to their satisfaction that such confession has been made, but evidence of the truth or falsehood of such confession shall not at that time be forthcoming, such justices within the United Kingdom are hereby required to remand such person in the manner herein-before mentioned, and to transmit a statement

[1] The section prior to 1860 made this confession before a Justice equivalent to enlistment. Now the punishment of fraud is summary, and equal to that which the Law imposes on a cheat. See Law Officers' Opinion of March, 1787.

of the case and descriptive return to the Secretary of State for the War Department, with a request to be informed whether such person appears to belong or to have belonged to the regiment or corps from which he shall have so confessed himself to have deserted; —— and a letter from the War Office in reply thereto, referring to such statement, and purporting to be signed by or on behalf of the Secretary of State for the War Department, shall be admissible in evidence against such person, and shall be deemed to be legal evidence of the facts stated therein, and on the receipt thereof the said justices shall forthwith proceed to adjudicate upon the case.—— IN India the authority herein given to two justices may be exercised by one European justice or magistrate.

Furlough in case of sickness.

38. WHEN there shall not be any military officer of rank not inferior to captain, or any adjutant of regular militia, within convenient distance of the place where any non-commissioned officer or soldier on furlough shall be detained by sickness or other casualty rendering necessary any extension of such furlough, it shall be lawful for any justice[1] who shall be satisfied of such necessity to grant an extension of furlough for a period not exceeding one month; —— and the said justice shall by letter immediately certify such extension and the cause thereof to the commanding officer of the corps or detachment to which such non-commissioned officer or soldier belongs, if known, and if not then to the agent of the regiment or corps, in order that the proper sum may be remitted to such non-commissioned officer or soldier, who shall not during the period of such extension of furlough be liable to be treated as a deserter; —— PROVIDED always, that nothing herein contained shall be construed to exempt any soldier from trial and punishment, according to the provisions of this Act, for any false representation made by him in that behalf to the said justice, or for any breach of discipline committed by him in applying for and obtaining the said extension of furlough.

39. NO person subject to this Act, having been acquitted or convicted of any crime or offence by the civil[2] magistrate, or by the verdict of a jury, shall be liable to be again convicted for the same crime or offence by a court-martial, or to be punished for the

[1] Previous Acts are 39 & 40 Geo. III. c. 27, s. 62 (which originated this power in 1800), 54 Geo. III. c. 25, s. 117, 57 Geo. III. c. 12, ss. 119, 120. In 1809 a section was added, directing Relief to be made out of the Poor Rates.—49 Geo. III. c. 12 s. 96.

[2] This section has been fully adverted to in Chap. III., par. 24, and in Vol. I. pp. 54, 144-147, 159, 206-215, 362, 449-451.

same otherwise than by cashiering in the case of a commissioned officer, or in the case of a warrant officer by reduction to an inferior class or to the rank of a private soldier by order of the Commander-in-Chief, or in the case of an army schoolmaster to discharge from the service, or loss of the whole or any period of his previous service reckoning towards pension on discharge by order of the Commander-in-Chief, or in the case of a non-commissioned officer by reduction to the ranks by order of the Commander-in-Chief or of the colonel, or in the militia by order of the appointed commandant of the regiment or corps; —— and whenever any officer or soldier shall have been tried by any court of ordinary criminal jurisdiction, the clerk of such court or other officer having the custody of the records of such court, or the deputy of such clerk, shall, if required by the officer commanding the regiment or corps to which such officer or soldier shall belong, transmit to him a certificate, setting forth the offence of which the prisoner was convicted, together with the judgment of the court thereon if such officer or soldier shall have been convicted, or of the acquittal of such officer or soldier, and shall be allowed for such certificate a fee of three shillings.

No person acquitted or convicted by the civil magistrate or by a jury to be tried by a court-martial for the same offence.

40. ANY person[1] attested for Her Majesty's army, or serving on the permanent staff of the disembodied[2] militia or volunteers other than as a commissioned officer, shall be liable to be taken out of Her Majesty's service only by process or execution on account of any charge of felony or of misdemeanor, or of any crime or offence other than the misdemeanor of absenting himself from his service, or neglecting to fulfil his contract, or otherwise misconducting himself respecting the same, or the misdemeanor of refusing to comply with an order of justices for the payment of money,[3] or on account of an original debt proved by affidavit of the plaintiff or of some one on his behalf to amount to the value of thirty[4] pounds at the least, over and above all costs of suit, such affidavit to be sworn, without payment of any fee, before some judge of the court out of which process or execution shall issue, or

Soldiers liable to be taken out of Her Majesty's service only for felony, misdemeanor, or for debts amounting to 30*l.* and upwards.

[1] This includes non-Commissioned Officers. Lloyd *v.* Woodhall, 1 Will., p. 216, and 1 Bla. Rep., p. 29. Chap. III., par. 28.

[2] These are specified, or they would not otherwise be entitled to the benefits of the Act. Rickman *v.* Studwick, 8 East. Rep., p. 105.

[3] An order for maintenance of an illegitimate child is not a Criminal matter. Reg. *v.* Ferrall, 15 Jur., p. 42; of a legitimate one, 3 Arch. J. of P., p. 283.

[4] As to the gradual increase of debt, Vol. I. pp. 207, 211.

before some person authorised to take affidavits in such court, of which affidavit, when duly filed in such court, a memorandum shall, without fee, be endorsed upon the back of such process, stating the facts sworn to, and the day of filing such affidavit; —— but no soldier or other person as aforesaid shall be liable by any process whatever to appear before any justice of the peace or other authority whatever, or to be taken out of Her Majesty's service by any writ, summons, warrant, order, judgment, execution, or any process whatsoever issued by or by the authority of any court of law, or any magistrate, justice or justices of the peace, or any other authority whatsoever, for any original debt not amounting to thirty pounds, or for not supporting or maintaining, or for not having supported or maintained, or for leaving or having left chargeable to any parish, township, or place, or to the common fund of any union, any relation or child which such soldier or person might, if not in Her Majesty's service, be compellable by law to relieve or maintain, or for neglecting to pay to the mother of any bastard[1] child, or to any person who may have been appointed to have the custody of such child, any sum to be paid in pursuance of an order on that behalf, or for the breach of any contract, covenant, agreement, or other engagement whatever, by parol or in writing, or for having left or deserted his employer or master, or his contract, work, or labour, or misconducting himself respecting the same, except in the case of an apprentice, or of an indentured labourer, as herein-after described; and all summonses, warrants, commitments, indictments, convictions, judgments, and sentences, on account of any of the matters for which it is herein declared that a soldier or other person as aforesaid is not liable to be taken out of Her Majesty's service, shall be utterly illegal, and null and void, to all intents and purposes; —— and any judge of any such court may examine into any complaint made by a soldier or by his superior officer, and by warrant under his hand discharge such soldier, without fee, he being shown to have been arrested contrary to the intent of this Act, and shall award reasonable costs to such complainant, who shall have for the recovery thereof the like remedy as would have been applicable to the recovery of any costs which might have been awarded against the complainant in any judgment or execution as aforesaid, or a writ of Habeas corpus ad subjiciendum shall be awarded or issued, and the discharge of any such soldier out of custody shall be ordered thereupon; ——

Soldiers not liable to be taken out of Her Majesty's service for debts under 30*l.*, or for not maintaining their families, or for breach of contract.

[1] Before this exemption was inserted. See Rex *v.* Archer, 2 Te. Rep., p. 270; Rex *v.* Bowen, 5 Te. Rep., p. 156. This section has been amended on various occasions.

PROVIDED that any plaintiff, upon notice of the cause of action first given in writing to any soldier, or left at his last quarters, may proceed in any action or suit to judgment, and have execution other than against the body or military necessaries or equipments of such soldier: —— PROVIDED also, that nothing herein contained relating to the leaving or deserting a master or employer, or to the breach of any contract, agreement, or engagement, shall apply to persons who shall be really and bonâ fide apprentices, duly bound, under the age of twenty-one years, or to indentured labourers, as herein-after prescribed.

Officers not to be sheriffs or mayors, &c.

41.[1] NO person who shall be commissioned and in full pay as an officer shall be capable of being nominated or elected to be sheriff of any county, borough, or other place, or to be mayor, portreeve, alderman, or to hold any office in any municipal corporation in any city, borough, or place in Great Britain or Ireland: —— PROVIDED that the competence or liability of any officer to be nominated to or to hold any of the aforesaid offices shall not be deemed to be affected by reason of the corps to which he belongs being assembled for annual[2] training at the time of his nomination to, or during the period of his tenure of, such office.

Attested recruits triable in some cases either before two justices or before a court-martial.

48. ANY person who shall have been attested or enrolled in the regular army or reserves, and who shall afterwards be discovered to have given any wilfully false answer to any question directed to be put by the proper authorities, or shall have made any wilfully false statement in the declaration herein-before mentioned, shall be liable, at the discretion of the proper military authorities, to be proceeded against before two justices in the manner herein-before mentioned, and by them sentenced accordingly, or to be tried by a district or garrison court-martial for the same, and punished in such manner as such court shall direct; —— and the declaration made by such person on his attestation or enrolment purporting to be made in accordance with the regulations of the Secretary of State shall, in the absence of proof to the contrary, be deemed sufficient evidence, whether before such justice or justices or before any court-martial, of such person having represented the several particulars as stated in such declaration.

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[1] First inserted in 1825. See Mutiny Act, sec. 57.

[2] Proviso added in 1872. Militia Officers were formerly exempted from the office of Sheriff, by 42 Geo. III. c. 90, but not so now. See 2 & 3 Vic. c. 59.

50. IF any man while belonging to a militia regiment shall enlist in and be attested for Her Majesty's army, he shall be liable to be tried before a court-martial on a charge for desertion; —— but it shall be lawful for the Secretary of State for the War Department to give such general directions as may from time to time appear to him necessary for placing any man who confesses himself to be a militiaman under stoppage of one penny a day of his pay for eighteen calendar months, in lieu of his being tried by court-martial; —— and in case such militiaman shall have belonged to the Militia Reserve at the time of his attestation for placing him under a further stoppage of one penny a day for two hundred and forty days; —— and further to give general directions as to the manner in which such stoppages shall be applied, and whether, on making good the same, the man shall be returned to his militia regiment, or be deemed to be a soldier, in the same manner as if he had not been a militiaman at the time of his attestation: —— PROVIDED that every soldier who while belonging to a militia regiment enlisted in Her Majesty's army, whether such enlistment took place before or after the passing of the Mutiny Act, 1860, shall reckon service towards the performance of his limited engagement from the date of his attestation: —— PROVIDED also, that any such soldier shall not reckon service for pension until the day on which his engagement for the militia would have expired; —— but if any such soldier shall subsequently to his enlistment have rendered long, faithful, or gallant service, the Secretary of State for War may, upon the special recommendation of the Commander-in-Chief, order that he may reckon service for pension from the date of his attestation. —— IF any non-commissioned officer of the volunteer permanent staff enlists in Her Majesty's army he may be tried and punished as a deserter, but if he confesses his desertion the Secretary of State for the War Department, instead of causing him to be tried and punished as a deserter, may cause him to be returned to his service on the volunteer permanent staff, to be there put under stoppages from his pay until he has repaid the amount of any bounty received by him and the expenses attending his enlistment, and also the value of any arms, &c., issued to him while on the volunteer permanent staff, and not duly delivered up by him; or may cause him to be held to his service in Her Majesty's army, with a direction, if it seems fit, that his time of service therein shall not be reckoned for pension until the time when his engagement on the volunteer permanent staff would have expired; and may further cause him to be put under stoppages of one penny a day of his pay until he has repaid the expense attending his engagement or attestation on the

As to militiamen enlisting into regular forces.

volunteer permanent staff, and also the value of any arms, clothing, or appointments issued to him while on the volunteer permanent staff, and not duly delivered up by him.

Punishment of persons offending against laws relating to enlistment.

51. EVERY person subject to this Act who shall wilfully act contrary to any of its provisions in any matter relating to the enlisting or attesting of recruits for Her Majesty's army shall be liable to be tried for such offence before a general, district, or garrison court-martial, and to be sentenced to such punishments other than death or penal servitude as such courts may award.

Interpretation.

67. All powers and provisions relating to Soldiers shall be construed to extend to Non-Commissioned Officers, unless where otherwise provided.

Ordinary course of criminal justice not to be interfered with.

76. NOTHING in this Act contained shall be construed to extend to exempt[1] any officer or soldier from being proceeded against by the ordinary course of law, when accused of felony, or of misdemeanor, or of any crime or offence other than the misdemeanors and offences herein-before mentioned; —— and if any commanding officer shall neglect or refuse, on application being made to him for that purpose, to deliver over to the civil magistrate any officer or soldier under his command, or shall wilfully obstruct, neglect, or refuse to assist the officers of justice in apprehending any officer or soldier under his command, so accused as aforesaid, such commanding officer shall, upon conviction thereof in any of Her Majesty's Superior Courts at Westminster, Dublin, or Edinburgh, or in any court of record in India, be deemed to be thereupon cashiered, and shall be thenceforth utterly disabled to have or hold any civil or military office or employment in the United Kingdom of Great Britain and Ireland or in Her Majesty's service; —— and a certificate of such conviction, containing the substance and effect of the indictment only, omitting the formal part, with the copy of the entry of the judgment of the court thereon, shall be transmitted to the Judge Advocate General in London.

Punishment of officers obstructing civil justice.

89. ANY action[2] which shall be brought against any person for

[1] The history of this section has been given in Chap. III., par. 23. See also 96th Article of War, and note thereon, *post.*

[2] I have already remarked upon this section in Chap. III., *ante.* A section of this kind is to be found in 1 Anne, Sess. 2, c. 20, s. 52, and in the third Mutiny Act, 1 Geo. I. c. 34. It was omitted for some years, and reinserted in 1797 by 37 Geo. III. c. 33, s. 80.

anything to be done in pursuance of this[1] Act shall be brought within six[2] calendar months after the doing thereof, and it shall be lawful for every such person to plead thereunto the general issue[3] Not Guilty, and to give all special matter in evidence to the jury; —— and if the verdict shall be for the defendant in any such action, or the plaintiff therein become nonsuited, or suffer any discontinuance thereof, or if in Scotland such court shall see fit to assoilzie the defendant or dismiss the complaint, the court in which the said matter shall be tried shall allow unto the defendant treble costs, for which the said defendant shall have the like remedy as in other cases where costs are by law given to defendants; —— and every action against any person for anything done in pursuance of this Act, or against any member or minister of a court-martial in respect of any sentence of such court, or of anything done by virtue or in pursuance of such sentence, shall be brought in some one of the courts of record at Westminster, or in Dublin, or in India, or in the Court of Session in Scotland, and in no other court whatsoever.

Form of actions at law.

96. ALL oaths and declarations which are authorised and required by this Act may be administered (unless where otherwise provided) by any justice of the peace, or other person having authority to administer oaths and declarations; —— and any person taking a false oath or declaration where an oath or declaration is authorised or required by this Act shall be deemed guilty of wilful and corrupt perjury,[4] or of wilfully making a false declaration, and being thereof duly convicted shall be liable to such pains and penalties as by law any person convicted of wilful and corrupt perjury is subject and liable to; —— and every commissioned officer convicted before a general court-martial of perjury, or of wilfully making a false declaration, shall be cashiered, and every soldier or other person amenable to the provisions of this Act found guilty thereof by a general, district, or garrison court-martial shall be punished at the discretion of such court. —— IN India, in all cases where any oath is hereby required

Administration of oaths.

Perjury.

[1] That is honestly done, though under mistake. Malicious Acts would not come within the meaning of the Act. See Keighley *v.* Bell, 4 Fos. and Fin., pp. 798-800, and Dawkins *v.* Rokeby, ib., p. 825.

[2] This section does not expire with the Act. See Wolton *v.* Gavin, 16 Q. B. Rep., p. 81, *note.* It was first inserted in 41 Geo. III. c. 11, s. 86.

[3] The defence under Statute of 21 James I. c. 4 is open under this. Dawkins *v.* Rokeby, sup. 825.

[4] This was first introduced by 49 Geo. III. c. 12, s. 118. See the prior Law and Law Officers' Opinion, Vol. I. pp. 169, and 522-523; also Reg. *v.* Heane, 4 Best and Sm., p. 958, and 10 Jur. (N. S.), p. 724. Chap. VI., par. 51.

to be taken, or any person is hereby required to be sworn, a solemn declaration or affirmation may be substituted, if by the laws for the time being in force in India such declaration or affirmation would be allowed to be substituted in the place of an oath, in case the party were about to depose as a witness in a civil action in any of the supreme courts at the Presidencies; and any person wilfully and knowingly giving false testimony on oath or solemn declaration or affirmation in any case wherein such oath or solemn declaration or affirmation shall have been made for the purpose of this Act, or any proceedings under this Act, shall be deemed guilty of wilful and corrupt perjury, and, being duly convicted thereof before a court-martial or otherwise, shall be liable to such pains and penalties as by any law in force in England, or by any law in force in India, any persons convicted of wilful and corrupt perjury are subject and liable to.

Offences against former Mutiny Acts and Articles of War.

97. ALL crimes and offences which have been committed against any [1] former Act for punishing mutiny and desertion, and for the better payment of the army and their quarters, or against any Act for punishing mutiny and desertion of officers and soldiers in the service of the East India Company, or against any of the Articles of War made and established by virtue of either of the same, may, during the continuance of this Act, be tried and punished in like manner as if they had been committed against this Act; —— and every warrant for holding any court-martial under any such former Act shall remain in full force, and all proceedings of courts-martial convened and held under any such warrant shall be continued, notwithstanding the expiration of such Act: —— PROVIDED always, that no person shall be liable to be tried or punished for any offence against any of the said Acts or Articles of War which shall appear to have been committed more than three [2] years before the date of the warrant for such trial, unless the person accused, by reason of his having absented himself, or of some other manifest impediment, shall not have been amenable to justice within that period, in which case such person shall be liable to be tried at any time not exceeding two years after the impediment shall have ceased.

[1] A section somewhat similar to this is found in 3 & 4 Anne, c. 5, s. 52. In 1718 the Act was said to apply to all crimes committed against a former Act. See Vol. I. p. 508; and Chap. V., par. 42. This section was inserted in 11 Geo. II. c. 2 (1737).

[2] Limitation was first inserted in 1 Geo. III. c. 6, s. 71, but desertion was excepted in the following year, by 2 Geo. III. c. 4, s. 72. In 1811, one year was proposed as the limitation. See 19 H. D. (O. S.), p. 368. As to the effect of this Limitation on the Jurisdiction of the Court, Chap. VI.

98. It should be the duty of all Officers and Soldiers to observe and conform to the provisions contained in "The Regimental Debts Act, 1863," and in the regulations for the better execution of the purposes of the said Act prescribed from time to time by Warrant under the Royal Sign Manual.[1]

Regimental Debts Act, 1863.

99. IN all places in India where any body of Her Majesty's forces may be serving situate beyond the jurisdiction of any court of small causes established by or under the authority of the Governor General of India in Council, actions of debt, and all personal actions against officers or against persons licensed to act as sutlers, or other persons amenable to the provisions of this Act not being soldiers, shall be cognizable before a court of requests composed of military officers, and not elsewhere, provided the value in question shall not exceed four hundred rupees, and that the defendant was a person of the above description when the cause of action arose, which court the commanding officer of any camp, garrison, cantonment, or military post is hereby authorised and empowered to convene.[2] —— WHENEVER owing to paucity of officers, or to any other cause, a court of requests cannot conveniently be held at the station where the defendant or defendants may be, it shall be lawful for the officer commanding the division or district to authorise the assembly of a court by the officer commanding at the nearest place where such court can be formed. —— COURTS of requests shall in all practicable cases consist of five commissioned officers, and in no instance of less than three, and the president thereof shall in all practicable cases be a field officer, and in no case be under the rank of a captain, and every member shall have served five years as a commissioned officer; —— and the president and members assisting at any such court, before any proceedings be had before it, shall take the following oath, which oath shall be administered by the president of the court to the other members thereof, and to the president by any member having first taken the oath; (that is to say,)

Where troops are serving beyond the jurisdiction of the courts of request, &c., actions of debt not exceeding 400 rupees to be cognizable by a military court.

"I, swear, that I will duly administer justice according to the evidence in the matters that shall be brought before me.

"So help me GOD."

And all witnesses before any such court shall be examined in the same manner as in the case of a trial by courts-martial. —— All

[1] Chap. IV., pars. 15 and 18; and Chap. IX, par. 25. [2] Chap. III., par. 30.

actions of debt and personal actions against persons amenable to this Act within the jurisdiction of any court of small causes shall be cognizable by such court to the extent of its powers; and all such actions where the amount sued for exceeds four hundred rupees shall be cognizable by a civil court or court of small causes only; and it shall be competent for any civil court or court of small causes, or for any military court of requests held in lieu thereof under the authority of this section, upon finding or awarding any debt or damage, either to award execution thereof generally, or to direct specially that the whole or any part thereof shall be stopped and paid over to the plaintiff out of any part not exceeding one half of any pay [1] or allowance, or out of any other public money which may respectively be coming to the defendant in the current or any future month or months, or to direct the same to be so paid by instalments. —— In regard to awards of execution general civil courts and courts of small causes shall proceed in accordance with the rules of procedure for such courts in India; —— and in all cases where execution shall be awarded generally by a military court of requests, the debt, if not paid forthwith, shall be levied by seizure and public sale of such of the defendant's goods and property as may be found within the camp, garrison, cantonment, or military post, under a written order of the commanding officer, grounded on the judgment of the court; —— and all orders of such commanding officer as to the manner of such sale, or the person by whom the same shall be made, or otherwise respecting the same, shall be valid and binding; —— and any goods and property of the defendant found within the limits of the camp, garrison, cantonment, or military post to which the defendant shall belong at any subsequent time shall be liable to be seized and sold in like manner in satisfaction of any remainder of such debt or damages; —— and if any question shall arise whether any such effects or property are liable to be taken in execution as aforesaid, the decision and order of the said commanding officer shall be final and conclusive with respect to the same, and if sufficient goods shall not be found within the limits of the camp, garrison, cantonment, or military post, then any public money or any part not exceeding one-half of the pay or allowances accruing to the defendant shall be stopped in liquidation of such debt or damages; —— and if such defendant shall not receive pay as an officer or from any public department, but be a sutler, servant, or follower, he may be arrested by like order of the commanding officer, and imprisoned in some convenient place

[1] This order cannot be made against the Crown or operate on half, or pay, beyond the control of the local authorities in India.

within the military boundaries for any period not exceeding two months, unless the debt be sooner paid; —— and the said commanding officer shall not, nor shall any person acting on his orders in respect of the matters aforesaid, incur any liability to any person or persons whomsoever for any act done by him in pursuance of the provisions aforesaid; —— and in cases where the said court shall direct specially that the whole or any part of the debt or damages shall be stopped and paid out of part of any pay and allowances, or out of any public money, the same shall be stopped and paid accordingly in conformity with direction; —— PROVIDED always, that nothing hereinbefore contained shall enable any such action as aforesaid to be brought in a military court of requests by any officer or soldier against any officer: —— PROVIDED also, that the articles of military equipment of any defendant shall not be deemed "goods and property" under this section.

Provisions relating to courts-martial on officers and soldiers of Her Majesty's Indian forces.

100. [1] THE government of any of the presidencies in India may suspend the proceedings of any court-martial held in India on any officer or soldier belonging to Her Majesty's Indian forces within such presidencies respectively; —— [2] and if any officer belonging to Her Majesty's Indian forces shall think himself wronged by the officer commanding the regiment, and shall upon due application made to him not receive the redress to which he may consider himself entitled, he may complain to his commander-in-chief in order to obtain justice, who is hereby required to examine into such complaint, and thereupon, either by himself or by his adjutant-general, to make his report to the government of the presidency to which such officer belongs, in order to receive the further directions of such government.

As to trial of officers and soldiers serving in India.

101. [3] ANY officer or soldier, or other person subject to this Act, who shall be serving in the territories of any foreign state in India, or in any country in India under the protection of Her Majesty, or at any place in Her Majesty's dominions in India (other than Prince of Wales Island, Singapore, or Malacca), at a distance of upwards of one hundred and twenty miles from the presidencies of Fort William, Fort Saint George, and Bombay respectively, and who shall be accused of having committed any offence which if committed in England would be punishable by the criminal law there, may, if the same be also

[1] Chap. I., par. 46.

[2] These are proceedings in analogy to those provided for by the 12th & 13th Articles of War, 1872. [3] Chap. III., par. 25; Chap. VII., pars. 28 and 29.

punishable under the Indian penal code for the time being, be tried by a general court-martial to be appointed by the general or other officer commanding in chief in such place for the time being, and, if found guilty, shall be liable to be sentenced by such court-martial to suffer such punishment as may legally be awarded by any of Her Majesty's courts of criminal jurisdiction within Her Majesty's dominions of India in respect of a like offence committed within the jurisdiction of such last-mentioned court; —— but no sentence of a general court-martial for any such offence shall be carried into execution until the same shall have been duly confirmed; —— and it shall be lawful for such general or other officer commanding in chief as aforesaid to confirm the sentence of any such general court-martial; —— and such general or other officer as aforesaid may, if he shall think fit, suspend, mitigate, or remit the sentence; —— or, in the case of a sentence of penal servitude, may commute the same to imprisonment, with or without hard labour, for such period as to him shall seem fit: —— PROVIDED always, that in all cases wherein a sentence of death or penal servitude shall have been awarded by any such general court-martial held for the trial of a commissioned officer, or where a sentence of death shall have been awarded by any such general court-martial held for the trial of any person subject to this Act other than a commissioned officer, such sentence shall not be carried into execution until it shall have been duly approved by the Governor General in Council, or Governor in Council of the presidency in the territories subordinate to which the offender shall have been tried: —— PROVIDED also, that any person who may have been so tried as aforesaid shall not be tried for the same offence by any other court whatsoever.

Definition of Commander-in-Chief.

103. Commander-in-Chief shall include the Field Marshal or other Officer Commanding in Chief Her Majesty's Forces for the time being.

Militia may be attached to regular forces.

105. HER Majesty may, by order of one of her Principal Secretaries of State, and subject to such conditions as may be determined by him, attach to any corps of the army in the United Kingdom any regiment or regiments of militia, and the officers, non-commissioned officers, and men (including the permanent staff) of any such regiment or regiments so attached shall be deemed for all purposes to form part of the corps to which they are attached[1]: —— PROVIDED that no person belonging to

[1] These sections were added in 1872. What may be the status of Militia, Yeomanry, or Volunteers, where "deemed for all purposes to form part of that Corps of the Regular Army to which they are attached," is not easily affirmed.

the militia shall be required to serve for a longer period, or in any other country, than that during and in which he might have been required to serve, or shall be liable to any greater punishment than that to which he might have been subjected, if this Act had not passed.

106. HER Majesty may, by order of one of her Principal Secretaries of State, and subject to such conditions as may be determined by him, attach to any corps of the army in the United Kingdom any corps of yeomanry or volunteers; and the officers, non-commissioned officers, and men (including the permanent staff) of any corps so attached shall be deemed for all purposes to form part of the corps of the army to which they are attached[r]: —— PROVIDED that no person belonging to the yeomanry or volunteers shall be required to serve in any other manner than that in which he might have been required to serve, or shall be liable to any greater punishment than that to which he might have been subjected, if this Act had not passed.

Yeomanry or volunteers may be attached to regular forces.

[r] See note p. 224.

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VICTORIA R.

RULES AND ARTICLES

FOR THE

BETTER GOVERNMENT OF OUR ARMY (IN 1872).

SECTION I.

DUTIES AND LIABILITIES.

MUSTERS.[1]

1. MUSTERS shall be taken of our regiments of life guards, horse guards, and foot guards, twice at least in every year, at such times as shall be appointed, and agreeably to the forms heretofore used; —— musters of every other corps in our army shall be taken according to such regulations as we may think fit to establish in relation thereto; —— no officer or soldier or other person liable to be mustered shall be absent from such musters without the leave of the proper authorities.

REGIMENTAL PAY OF OFFICERS.[2]

2. REGIMENTAL pay shall not be issued to any officer who shall absent himself without leave, or shall overstay the period for which leave of absence may have been granted him; —— or who shall not on promotion; —— exchange; —— or removal to another regiment; —— or on appointment from the half to the full pay; —— join within *two months* the corps to which he may have been so appointed; —— or who shall not, on his first appointment in the army, join as directed in orders from our adjutant general; —— unless a satisfactory explanation shall have been given through his colonel or commanding officer, and shall have been notified by our Commander-in-Chief to our Secretary of State for War.

CONCEALMENT BY RECRUIT ON ENLISTMENT.

3. ANY recruit who shall have enlisted into and been attested for our army or our Indian forces, and who shall be discovered to be incapable of active service by reason of any infirmity concealed or not declared by such recruit at the time of his attestation,

[1] Art. 28 of 1717; and see 26 Geo. III. c. 104, s. 14. The frauds in this system formerly in force are adverted to, Vol. I. p. 123, and Vol. II. p. 8.

[2] The Crown has always exercised the most absolute control over the pay of the Army.

may be transferred to any garrison, or veteran or invalid battalion or company, notwithstanding he shall have enlisted for any particular regiment or corps, and shall be entitled to receive such proportion or residue of bounty only as our Secretary of State for War may allow, instead of the bounty to which such recruit would have been otherwise entitled.

CONCEALMENT ON RE-ENLISTMENT.

*4. IF any person discharged from our army for disability, misconduct, or for any other cause, shall subsequently re-enter the army, and shall, at the time of his being attested, conceal the fact, or misrepresent the cause of his former discharge; —— he shall neither be allowed to reckon his past service, nor to receive any pension, if again discharged for disability.

FURLOUGHS.[1]

*5. COMMANDING officers of regiments in Great Britain and Ireland are authorized to grant furloughs to soldiers, subject to the control of the general officers under whose command the regiments may be serving; —— but these indulgences are not to be granted during the seasons for reviews, field exercise, and inspections; —— viz. between the tenth day of March and twenty-fifth day of October in each year; —— except under peculiar and urgent circumstances; —— the number of soldiers to whom furloughs may be granted, between the twenty-fifth day of October and tenth day of March following, is to be regulated according to the general order which may be issued on that head; —— and when any soldier on furlough shall be detained by sickness or other casualty beyond the time therein limited, any military officer, not below the rank of captain, or any adjutant of regular militia, or when there is not any such officer within a convenient distance, then any justice, may grant an extension of such furlough for a period not exceeding *one month*, notifying the same to the commanding officer of the corps to which the man belongs, or to the agent of the regiment.

SUTTLING.[2]

6. NO suttler shall be permitted to sell any kind of liquors or victuals or to keep his house or shop open for the entertainment of soldiers, after *nine* o'clock at night, or before the beating of the reveilles, nor shall he be permitted to sell liquors of any sort during such time or times as he shall be forbidden so to do by the officer commanding the troops in the barracks to which the canteen belongs; —— nor

[1] Art. 25 of 1717. In 1748 the C. O. could give furloughs at two men per Company. [2] Art. 29 of 1717; and see sec. 8 (Art. 2) of Art. of 1748.

upon Sundays during Divine service or sermon; —— on the penalty of being dismissed from all future suttling; —— but all officers, soldiers, and suttlers shall have full liberty to bring into any of our forts or garrisons any quantity or species of provisions, eatable or drinkable, except where any contracts are entered into by us, or by our order, for furnishing such provisions; —— (this exception extends only to the species of provisions so contracted for;) —— and all officers commanding in our forts, barracks, or garrisons, are required to see, as they shall be answerable to us for their neglect, that the persons permitted to suttle, supply the soldier with good and wholesome provisions, at the market price.

CRYING DOWN CREDIT.[1]

7. THE commanding officer of every corps shall, upon its first coming to any place where it is to remain in quarters, cause public proclamation to be made that if the landlords or other inhabitants suffer the soldiers to contract debts, such debts will not be discharged;—— the said commanding officer refusing or neglecting so to do shall be suspended for *three months*, during which time his whole pay shall be applied to the discharging of such debts as shall have been contracted by the soldiers under his command beyond the amount of their daily subsistence; if there be any overplus remaining it may be returned to him: —— if after public proclamation made as above directed the inhabitants shall notwithstanding suffer the soldiers to contract debts with them, it will be at their own peril, the officers not being obliged to discharge such debts.

BILLETS.[2]

*8. IF any complaint shall be made against any officer or soldier of ill-treatment of landlords by violence, extortion, or making disturbances in billets, the officer commanding shall, after proof of the justice of the complaint, cause reparation to be made, either by causing the offender to be tried for the offence, or by making compensation in money, to the extent of stopping half the offender's pay daily until the demand be satisfied or full reparation be made; and if such commanding officer shall refuse or neglect to cause such reparation to be made he shall be deemed equally culpable as the actual offender; ——and if the officer or soldier shall protest against such summary proceeding of his commanding officer, the matter shall

[1] The original order for this is to be found in the W. O. Mis. Bk. (517), 1692. See also 4 W. & M. c. 13, s. 22, and 8 & 9 Will. III. c. 13, s. 4; also Vol. I. p. 208; and Chap. III., par. 28 *ante*.

[2] This (8) was Article 33 of 1717.

be inquired into, and, if necessary, tried before a competent court martial.

CARRIAGES.[1]

9. THE commanding officer of every corps ordered to march is to apply to the proper magistrates for the necessary carriages; —— and to pay for them as directed by the Mutiny Act.

ARMS AND STORES.[2]

10. EVERY captain is charged with the arms, accoutrements, ammunition, clothing, or other war-like stores belonging to the troop or company under his command, for which he is to be accountable to his colonel or officer commanding the regiment, in case of their being lost, spoiled, or damaged, not by unavoidable accident or on actual service.

11. [3]ALL public stores taken from the enemy, whether of artillery, ammunition, engineer stores, clothing, forage, or provisions, shall be secured for our service, and the officers commanding in chief are to be answerable to us for any neglect in this respect.

REDRESS OF WRONGS.[4]

12. IF any officer shall think himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself to be entitled; —— he may complain to the general commanding in chief of our forces, in order to obtain justice; —— who is hereby required to examine into such complaint; —— and either by himself, or by our Secretary of State for War, to make his report to us thereupon, in order to receive our further directions.

*13.[4] IF a non-commissioned officer or soldier shall think himself wronged in any matter affecting his pay or clothing by his captain, or other officer commanding the troop or company to which he belongs, he is to complain thereof to the commanding officer of the regiment, who is hereby required to summon a *regimental* court of inquiry for the purpose of determining whether such complaint is just; —— from the decision of which court of inquiry either party may, if he thinks himself still aggrieved, appeal to a *general* court-

[1] This (9) was Article 34 of 1717.

[2] Art. 43 of 1717, and sec. 13 Art. 4 of 1748. Each Captain is responsible out of his contingent allowance for damage to arms, &c. Vol. I. p. 41, and Vol. II. pp. 115, 209, and 675. [3] Art. 17 of 1717, and sec. 14 Art. 20 of 1748.

[4] Art. 19 of 1717, and sec. 12 of 1748. See Chap. I., par. 33; IV., par. 9; IX., par. 24. The recent cases of Dawkins *v.* Rokeby, 4 Fos. and Fin., p. 833, Keighley *v.* Bell, ib., p. 798.

martial; —— and such court shall hear and determine the merits of the appeal, and after determining the same, and after allowing the appellant to show cause to the contrary, by himself, and by witnesses, if any, may either confirm the appeal or dismiss it without more, or may, if it shall think fit, pronounce such appeal groundless and vexatious, and may thereupon sentence such appellant to such punishment as a general court-martial is competent to award: ——Provided that no stoppage of pay in respect of barrack damage duly assessed by a court of inquiry shall give any non-commissioned officer or soldier a right of appeal to a general or other court-martial.

MAINTENANCE OF GOOD ORDER.[1]

14. EVERY commanding officer shall keep good order, and to the utmost of his power redress all disorders committed by any officer or soldier under his command; —— and all officers and soldiers are to behave themselves orderly in quarters and on their march, and are not to quit their camp or quarters, or to fail at parade.

15.[2] ALL officers, of what condition soever, have power to quell all quarrels, frays, and disorders, though the persons concerned should be of superior rank, or, belong to another corps, and either to order officers into arrest, or soldiers into confinement, until their proper superior officers shall be acquainted therewith.

16.[3] NO officer shall use any reproachful or provoking speeches or gestures to another.

PROCEEDINGS ON COMMISSION OF OFFENCES.[4]

17. WHENEVER any officer or soldier shall be accused of a capital crime, or of violence, or any offence against the persons or property of our subjects, punishable by the known laws of the land, the commanding officer and officers of his corps are, upon application duly made in behalf of the party injured, to use their utmost endeavours to deliver over such accused person to the civil magistrate; —— and assist the officers of justice in apprehending and securing him.

18. WHENEVER any person[5] subject to the Mutiny Act shall be charged with committing an offence, he shall, if an officer, be

[1] Art. 34 of 1717. [2] Art. 20 of 1717, and adverted to in Chap. IV., par. 8.
[3] Art. 20 of 1717, and adverted to in Chap. IV.
[4] Art. 18 of 1717, and sec. 11 of 1748.
[5] This was first inserted in the Articles of 1722 (See Mis. Bk., p. 226). In Articles for 1742 the man was to be tried by a Regimental Court, or application made to the Secretary at War for a General Court. In 1748 it was remodelled as section 15, Articles 18, 19, and 21 of that Code. Chap. V., par. 52.

put in arrest, and if a soldier, be put in confinement, and shall, within a reasonable time,[1] either be brought to trial before a court-martial, or be discharged from the said arrest or confinement.

19.[2] NO officer commanding a guard, or provost marshal, shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer belonging to our forces; —— and every such officer or non-commissioned officer shall, at the same time, or without unnecessary delay, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.

DISCHARGES.[3]

20. EVERY commissioned officer sentenced to be kept in penal servitude, on such sentence being confirmed, shall cease to belong to our service.

*21.[4] SOLDIERS, having been duly enlisted and attested, shall not be dismissed our service without a discharge or certificate, granted according to the general order on that head, which shall be in force at the time of granting the discharge.

*22.[5] NO *soldier* shall be discharged, unless by sentence of court-martial, or by order of our Commander-in-Chief, certified by an officer of the adjutant general's department; —— or by authority direct from us; —— except in the cases of soldiers serving on foreign stations, where general officers commanding are authorised, under such regulations and restrictions as may from time to time be prescribed by our Commander-in-Chief, to direct that soldiers shall be discharged.

*23.[5] NO soldier shall be discharged, whether for unfitness or for any other cause, unless his services, conduct, character, and the

[1] The alteration from eight days to "reasonable time," has been adverted to in Chap. V., par. 57. Keighley *v.* Bell, 4 Fos. and Fin., p. 798, and Dawkins *v.* Rokeby, ib., p. 820, were decided on this Article.

[2] Art. 44 of 1717, and sec. 15 Art. 20 of 1748. The Article has been discussed in Chap. V., par. 54. The cases of Warden *v.* Bailey, 4 Taunt. Rep., p. 86, Wolton *v.* Gavin, 16 Q. B. Rep., p. 48, were decided upon it.

[3] This was first inserted in 1860. Formerly the Army recruited from the criminal class (Vol. II. p. 13), and now it expels them upon the civil community.

[4] Art. 13 of 1717. It must not be supposed that the "discharge" is the only test of status. It was held so to be in Grant *v.* Gould, but then the enlistments being for life, the onus of proof rested on the enlisted Soldier to prove his discharge. With "limited" enlistments effluxion of time terminates the contract.

[5] These are for the protection of the Soldier from the power of the Officer, not of the Crown. That power of dismissal is unlimited, and not affected by these Articles. Vol. II. p. 37. When the Regiment had to provide Recruits (as the Guards now have to do), the dismissal was always in the hands of the Colonel;

cause of his discharge be ascertained before a regimental board, as hereinafter provided; —— but when a soldier shall have been sentenced to penal servitude he may be discharged forthwith by order of our Commander-in-Chief, and such discharge shall not affect the execution of his sentence.

RETURNS AND ACCOUNTS.

24.[1] THE commanding officer of every corps, at home and abroad, shall, on the first of every month, transmit to the Commander-in-Chief of our forces, and to our Secretary of State for War, an exact return of the state of such corps, specifying the names of the officers absent, and the reason for and time of their absence.

25.[1] RETURNS shall be made, in like manner, of the state of our forces in Ireland, to the Lord Lieutenant or chief governors thereof, and to the general officer there commanding; —— and of our forces in Scotland to the officer there commanding.

26. EXACT returns of the state of our garrisons and corps stationed abroad shall be transmitted by their respective governors or commanders there residing, by all convenient opportunities, to our Commander-in-Chief and Secretary of State for War.

27.[2] ALL commissions granted by us, or by any of our generals having authority from us, shall be entered in the books of our Secretary of State for War, otherwise they will not be allowed of at the musters.

28. IT shall be the duty of all officers and soldiers to observe and conform to the provisions contained in the Regimental Debts Act, 1863, and in the regulations for the better execution of the purposes of the said Act prescribed from time to time by warrant under the royal sign manual.

*29. EVERY non-commissioned officer and soldier of our forces shall be provided with a book[3] calculated to show his services, age, date of enlistment, and the actual state of his accounts, in conformity with our regulations on this head;——and every commanding officer shall state, upon the monthly return of the regiment

but now the discharge of a man throws the cost of a new Recruit and of an old Soldier (as a Pensioner) on the Public, hence this power is limited. Vol. II. pp. 40, 279-290. In Freer *v.* Marshall, 4 Fos. and Fin., p. 485, the Soldier brought an action to recover damages for his discharge, but failed.

[1] Inserted in 1748.

[2] As to former necessity for this, see Vol. II. p. 73.

[3] This Book was introduced at the instance of the late Lord Hardinge, in 1829. See W. O. Circular 289, and is known as "Tommy Atkins." Vol. ii. pp. 58-60.

under his command, whether all the non-commissioned officers and soldiers of the regiment are in possession of the said books, and whether the orders on this head are properly attended to.

30. THE accounts of our forces shall be made up and transmitted according to such regulations as we may think fit to establish in relation thereto.

SECTION II.

CRIMES AND PUNISHMENTS.

CRIMES WITH REGARD TO DIVINE WORSHIP.

31. ANY officer or soldier who, not having just impediment, shall not attend Divine service in the place[1] appointed for the assembling of the corps to which he belongs; —— or who, being present, shall behave indecently or irreverently; —— or who shall offer violence to a chaplain of the army, or to any other minister of God's Word, shall be liable, if an officer, to such punishment as by a *general* court-martial shall be awarded, and if a soldier, to such punishment as by a *general, district,* or *garrison* court-martial shall be awarded.

32. ANY non-commissioned officer or soldier who, without due cause or without leave from his commanding officer, shall absent himself from the garrison or regimental school,[2] when duly ordered to attend there, shall be liable to be tried before a court-martial for disobedience of orders, or be subject to such punishment as it may be competent for his commanding officer to award.

33.[3] ANY commissioned chaplain who shall absent himself from his duty (excepting in case of sickness or leave of absence) shall be brought before a *general* court-martial, and punished as the circumstances of his offence may require.

34. ANY commissioned chaplain who shall be guilty of misconduct[4] or vicious behaviour derogating from the sacred character with which he is invested, shall, on conviction before a *general* court-martial, be discharged from his office.

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[1] This has been adverted to in Chap. IV. par. 12. Parliament refused to alter this Article in 1811. See 19 H. D. (O. S.), p. 368.

[2] This article is inserted to meet the case of Warden *v.* Bailey, 4 Taunt. Rep., p. 67, and Vol. II. p. 554.

[3] In Articles of 1748.

[4] This was "drunkenness or other scandalous," in 1748.

PERJURY.

35.[1] EVERY commissioned officer convicted before a *general* court-martial of perjury shall be cashiered; —— and every soldier or other person subject to these articles convicted thereof before a *general*, *district*, or *garrison* court-martial, shall be liable to such punishments as such court may award.

MUTINY AND INSUBORDINATION.

36. ANY officer or soldier who shall begin, excite, cause, or join in any mutiny or sedition in any of our land or marine forces, or in any party, post, detachment, or guard, on any pretence whatever; —— or who, being present at any mutiny or sedition, shall not use his utmost endeavour to suppress the same; or who shall conspire with any other person to cause a mutiny; —— or who, coming to the knowledge of any mutiny or intended mutiny, shall not without delay give information thereof to his commanding officer; —— or

37. WHO shall strike a superior officer, or use or offer any violence against him, being in the execution of his office; —— or who, being confined in a military prison, shall strike, use, or offer any violence against a visitor or other his superior military officer, being in the execution of his office; —— or

38. WHO shall disobey the lawful command[2] of his superior officer; ——

SHALL, if an officer, suffer DEATH, or such other punishment as by a *general* court-martial shall be awarded; ——

AND, if a soldier, shall suffer DEATH, PENAL SERVITUDE for a term not less than five years, or such other punishment as by a *general* court-martial shall be awarded.

39. Any officer or soldier who shall use traitorous or disrespectful words against our royal person,[3] or any of our royal family; —— or

40. WHO, being concerned in any fray, shall refuse to obey any other officer (though of inferior rank) who shall order him into arrest; —— or shall draw his sword upon or offer violence to such officer; ——

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[1] This was first inserted in 1860 (see 40th Art.). The former method of dealing with perjury is shown in Chap. VI., par, 51.

[2] May the order be required in writing—Fray *v.* Ogle, 4 Taunt. Rep., p. 76; and see the discussion on the Balaklava Charge, 137 H. D. (3), pp. 736, 758 762; and vol. ii. p. 136, as to the debate in 1770. Chap. III., pars. 31, 32.

[3] The "Prince of Wales" was also specified in the Articles of 1748.

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, before a *general* court-martial, be CASHIERED; —— and if a *soldier*, shall, on conviction thereof before a *general, district*, or *garrison* court-martial, be liable to such punishments as such court may award.

41. ANY officer or soldier who shall behave with contempt or disrespect towards the general[1] or other commander-in-chief of our forces, or shall speak words tending to his hurt or dishonour; —— or shall strike or offer violence or use threatening or insubordinate language to his superior officer; ——

SHALL, if an *officer*, on conviction thereof, be LIABLE to be CASHIERED; —— or to suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded; —— and if a *non-commissioned officer or soldier*, shall, on conviction thereof, be punished according to the nature and degree of the offence, by a *general, district, garrison, regimental*, or other court-martial.

DESERTION, AND ABSENCE WITHOUT LEAVE.

42.[2] ANY officer who shall desert our service shall suffer DEATH, or such other punishment as by a *general* court-martial shall be awarded; ——

ANY non-commissioned officer or soldier who shall desert our service shall suffer DEATH, or such other punishment as by a *general* court-martial shall be awarded; —— and if tried by a *district* or *garrison* court-martial, shall suffer such punishment as such court may award; —— and any non-commissioned officer or soldier enlisted or in pay in any regiment or corps who shall, without having first obtained a regular discharge therefrom, enlist himself in our army, may be punished as a deserter from our service. Upon the conviction by court-martial of any soldier of the crime of desertion, our Commander-in-Chief may, and if the court-martial has been held on a foreign station, the general or other

[1] This always has been a Military offence. "The General's authority," wrote Bruce, in 1717, "should be with a nod, and by his looks he should strike in them an awful regard for his person. For his authority being once sunk, and his person rendered cheap and contemptible with the Soldiery, 'tis more than probable their insolence will not stick there, but that at length, Actæon-like, he will be devoured by the beasts he feeds," p. 159.

The Duke of Marlborough (not unlike another General) thought equal respect ought to be shown to his wife, and in 1705 the W. O. Letter Books show a correspondence on the subject (33), pp. 233 and 253.

[2] Arts. 12 and 13 of 1717.

officer commanding at such station may, order such soldier to serve in any regiment or corps.

43. ANY soldier may be tried for desertion without reference to the time during which he may have been absent, and may thereupon be found guilty either of desertion or of absence without leave.[1]

44.[2] ANY officer or soldier who shall advise or persuade any other officer or soldier to desert our service; —— or who shall knowingly receive and entertain any deserter, and shall not immediately on discovery give notice to his commanding officer, or to our Secretary of State for War, or shall not cause such deserter to be apprehended by the civil power;——

SHALL, if an *officer*, on conviction thereof before a *general* court-martial, be CASHIERED; —— and if a *soldier*, shall, on conviction thereof before a *general*, *district*, or *garrison* court-martial, be liable to such punishments as such courts may award.

45. IF any man while belonging to a militia regiment, or to the volunteer permanent staff, shall enlist in and be attested for our army, he may be dealt with in the manner provided for in the 50th section of the Mutiny Act.

46. IF any soldier while serving in any regiment or corps shall confess to his commanding officer that he is a deserter from some other regiment or corps, or from the militia, and evidence of the truth or falsehood of such confession cannot then be conveniently obtained, a record of such confession, signed by such commanding officer, shall be entered in the regimental books, and such soldier shall continue to do duty in the regiment or corps in which he shall then be serving, or in any other regiment or corps to which he may be transferred, until he shall be discharged, or until legal proof can be obtained of the truth or falsehood of such confession, of the making of which confession the said record, or a copy thereof purporting to bear the signature of the officer having the custody of the regimental books, shall be sufficient evidence; —— and in any case where such confession shall then appear to be true, such soldier may be arraigned before a *general*, *district*, or *garrison* court-martial on a charge for desertion, and, if convicted, may be punished accordingly; —— and where such confession shall appear to be false, such soldier may be arraigned before a *district* or *garrison* court-martial on a charge for making a false statement to his commanding officer; —— and he may, if convicted, be sentenced, in

[1] Chap. VI., pars. 63, 64.

[2] Art. 14 of 1717.

addition to imprisonment, with or without hard labour, to forfeiture of all advantage as to good-conduct pay, and pension on discharge, which might otherwise have accrued from his former service, and to forfeiture of any good-conduct badges, medals, decorations, and of any annuities or gratuities relating thereto; —— a letter purporting to be written in reply to an inquiry respecting the truth or falsehood of such confession, and to be signed by or on behalf of the commanding officer of the regiment or corps from which such soldier confesses himself to have deserted, shall be admissible in evidence against such soldier, and shall be deemed to be legal evidence of the facts stated therein.

47. OUR Commander-in-Chief may, and any general or other officer commanding on any foreign station, may, within his command, dispense with the trial of any soldier confessing desertion, if he shall so think fit, and may thereupon order such soldier to serve in any regiment or corps; —— and such soldier shall thereupon forfeit his service for the period between the date of the desertion stated in his confession and the date of the said order to serve, and shall not be allowed to reckon the said period as a part of the limited service for which he was enlisted or re-engaged, or for which his term of service may have been prolonged; and shall also forfeit all advantage as to good-conduct pay, and pension on discharge, which might have otherwise accrued from the length of his former service, and shall also forfeit all medals and decorations whatsoever which he may be in possession of and authorized to wear, together with any annuity or gratuity thereto appertaining; —— but any such soldier, if he shall have subsequently performed good, faithful, or gallant services in our army, may, on the same being duly certified by our Commander-in-Chief, be eligible to be restored to the benefit of the whole or of any part of his former service; and should the restoration be approved by us, our order for the same will be signified through our Secretary of State for War.

48. * * * * * * *

49. EVERY soldier shall be liable to be tried and punished for desertion from any regiment or corps into which he may have unlawfully enlisted, although he may of right belong to another regiment or corps, and be a deserter therefrom;——and any number of charges of desertion may form the subject of a single arraignment.

50.[1] ANY soldier who, without leave from his commanding officer,

[1] Sec. 14, Art. 1 of 1748, and Art. 25 of 1717.

shall absent himself from his quarters, garrison, or camp, or from his troop, company, or detachment, or who, without a pass or leave in writing from his commanding officer, shall be found one mile or upwards from the camp, shall, on conviction thereof, be punished, according to the degree of the offence, by a *general* or other court-martial.

IF any soldier shall absent himself without leave for any period not exceeding *five* days, and shall not account for the same to the satisfaction of his commanding officer, and if any soldier shall be guilty of any other offence which the commanding officer may not think necessary to bring before a court-martial, the commanding officer may, in addition to any minor punishment he is authorized to award, order that such soldier shall be imprisoned for any period not exceeding *one hundred and sixty-eight* hours, with or without hard labour, or with or without solitary confinement, as the said commanding officer may think fit; —— and any soldier who shall have absented himself as aforesaid may in addition to or instead of such imprisonment, or other punishment which the commanding officer has authority to inflict, be further deprived, by order of his commanding officer, of his pay for the day or days of such absence;——

ANY soldier ordered by his commanding officer to suffer imprisonment or deprivation of pay (except in certain cases of fines for drunkenness in which the offence is not denied) shall, if he so request, have a right to be tried by a court-martial for his offence instead of submitting to such imprisonment or deprivation.

OFFENCES IN THE FIELD, CAMP, GARRISON, OR QUARTERS.

51.[1] ANY officer or soldier who shall hold correspondence with or give intelligence to the enemy, directly or indirectly, —— or relieve with money, victuals, or ammunition, or knowingly harbour or protect, an enemy; —— or

52.[2] MISBEHAVE before the enemy, or shamefully abandon or deliver up any garrison, fortress, post, or guard committed to his charge, or which it was his duty to defend; —— or shall compel, or speak words, or use other means to induce the governor or commanding officer, or any other person, to deliver up to the enemy or to abandon, any garrison, fortress, post, or guard; —— or

[1] Art. 7 of 1717, and sec. 14 Art. 18 of 1748.
[2] Art. 16 of 1717, and sec. 14 Art. 13 of 1748.

53.[1] LEAVE his commanding officer or his post to go in search of plunder;[2] —— or

54.[3] TREACHEROUSLY make known the watchword to any person not entitled to receive it according to the rules and discipline of war; —— or

55.[4] BY discharging fire-arms, drawing swords, beating drums, making signals, using words, or by any means whatever, intentionally occasion false alarms in action, camp, garrison, or quarters; —— or

56.[5] CAST away his arms or ammunition in presence of an enemy; —— or

57.[6] WHO, being a sentinel, shall be found sleeping on his post, or shall leave it before being regularly relieved; —— or

58.[7] WHO, being employed in foreign parts, shall do violence to

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[1] Ib., Art. 21 of 1748.

[2] The Articles of 1748 added, "that he should be reputed a disobeyer of Military Orders, and should suffer death." The passage in Sir William Napier's 'History of the Peninsular War' (Book 21 Chap. v.) will occur to many readers. "Thus the disobedience of three plundering knaves, unworthy of the name of Soldiers, deprived one consummate Commander (Wellington) of the most splendid success, and saved another (Soult) from the most terrible disaster."

[3] Art. 41 of 1717, and sec. 14. Art. 15 of 1748.

[4] Art. 39 of 1717, and sec. 14, Art. 9 of 1748. See the Duke of Wellington's Despatches, vol. iii. p. 242.

[5] Sec. 14, Art. 14 of 1748. Practically, a route. See vol. iii. p. 450, and vol. viii. p. 162 of Despatches.

[6] Art. 37 of 1717, and sec. 14, Art. 6, of 1748.

[7] Sec. 14, Arts. 11 and 17 of 1748.

The difficulty in the Peninsular War of repressing the crimes here enumerated, was often made the subject of the Duke's Despatches and General Orders. In the General Orders of May, 1809, he warns the Officers "that the Army will very soon be no better than a banditti." Vol. iii. p. 242. In his Despatch to Lord Castlereagh in June, he complains that the powers of the Mutiny Act were not sufficiently stringent for the restraint and punishment of crime, so "that the English Army was worse than an enemy in the country," ib. pp. 304, 488; vol. iv. p. 457.; vol. v. pp. 583, 705. The difficulty of obtaining a conviction before a Court-martial was very great, as the Portuguese were afraid to, and the Soldiers would not, appear as witnesses against the offenders, ib. pp. 700 and 766. Whenever, therefore, a conviction was obtained for robbing or illtreating the inhabitants, the sentence was invariably executed, and the Duke gave out in General Orders (February, 1810), that such offences he was "determined in no instance to forgive." Ib. 753, and vol. iv. pp. 1, 6, 7, 103, and 678.

Even in less important matters, offences against public propriety, the Duke was not less resolute. In rebuking some Officers who had misconducted themselves in the theatre at Lisbon, to the annoyance of the audience, he wrote:—"The English public would not bear this, and I see no reason why the Portuguese public should be worse treated" (vol. iii. p. 564); and where the offences com-

any person bringing provisions or other necessaries to the quarters of our forces; —— or force a safeguard; —— or break into any house or store or cellar for plunder; ——

SHALL on conviction of any one of the aforesaid offences suffer DEATH, PENAL SERVITUDE for a term of not less than five years, or such other punishment as by a *general* court-martial shall be awarded.

59.[1] ANY officer or soldier who shall send any flag of truce to the enemy without due authority; —— or

60. WHO shall give a parole or watchword different from what he received without good and sufficient cause; —— or

61.[2] WHO shall, in operations in the field, spread reports by words or by letters calculated to create unnecessary alarm by spreading such reports, either in the vicinity or in rear of the army; ——or

62.[3] WHO shall, in action or previously to going into action, use words tending to create alarm or despondency; —— or

63. WHO shall, either verbally or in writing, disclose the numbers, position, magazines, or preparations of the army for sieges or movements, and by such disclosures shall produce effects injurious to our army and our service; —— or

64.[4] WHO shall leave the ranks in order to secure prisoners or horses, or on pretence of taking wounded officers or men to the rear, without orders from his superior officer; —— or

65. WHO shall leave his guard, picquet, or post; —— or shall be taken prisoner[5] by any want of due precaution, or by dis-

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mitted were punishable by the Local Authorities, he never interfered to screen the guilty, or prevent the law taking its course. Ib., pp. 350-461; vol. v. p. 731; vol. vi. p. 382.

[1] As to receiving and sending flags of truce, see General Orders, 1 August, 1810, vol. iv., p. 197.

[2] Art. 16 of 1717. "Not to listen" (as the Duke warned his Officers) "to the senseless reports which invariably prevail on the flank and rear of all Armies." Vol. iii. p. 480, and see vol. viii. p. 156.

As to panic with Cavalry, who having horses can fly, vol. iv. p. 615, and vol. iv. of Sir Charles Napier's Life, p. 219.

[3] "The croaking which already prevails in the Army, and particularly about Head-quarters, is disgraceful to the nation, and does infinite mischief to our cause." Vol. iv. p. 266.

[4] "The Soldiers," wrote the Duke, "look for and secure captures rather than destroy the enemy." Vol. v. p. 68. "It is an unrivalled Army for fighting if the Soldiers can only be kept in their ranks during the battle." Vol. vi. p. 604.

[5] The pay of these was withheld, until an inquiry showed that it was not by

obedience of orders; —— or fall into the enemy's hands by passing through[1] outposts; —— or

66.[2] WHO shall irregularly detain, seize, or appropriate to his own corps or detachment bread, spirits, forage, or any supplies proceeding to the army, contrary to the orders issued in that respect; —— or

67. WHO, being in command of any of our garrisons, forts, or barracks, shall connive at the exaction of exorbitant prices for houses or stalls let to suttlers; —— or lay any duty upon, or take any fee or advantage, or be in any way interested in the sale of provisions or merchandise brought into places under his command; —— or

68. WHO shall impede the provost marshal or any other officer legally exercising authority; —— or refuse to assist him when requiring his aid in the execution of his duty; —— or

69.[3] WHO, being under arrest, or in prison, shall leave or escape from his confinement before he is set at liberty by proper authority;——

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, before a *general* court-martial, be CASHIERED; —— and, if a *soldier*, shall, on conviction thereof before a *general*, *district*, or *garrison* court-martial, be liable to such punishments as shall accord with the provisions of the Mutiny Act and with the usage of the service.

70.[4] ANY officer or soldier who shall fail to appear at the place of parade or rendezvous appointed by his commanding officer, or shall

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their neglect. 55 Geo. III. c. 108, s. 125, and 31 H. D. (O. S.), p. 831. As to desertion by the Irish Militia, see vol. iv., p. 405, vol. v., p. 417 and 634.

[1] See the Duke's General Orders, 15 March, 1813.

[2] An illustration of the necessity of severe punishment may be given in the following extract:—"A detachment seldom marches, particularly if under the command of a non-Commissioned Officer only (which rarely happens), that a murder or a highway robbery, or some act of outrage is not committed by the British Soldiers comprising it . . . . and I am sorry to add that a convoy has seldom arrived with money that the chests have not been broken open, and some of the money stolen by the Soldiers in whose charge it was placed, and they have never brought up shoes or other necessaries which could be of use to them, or which they could sell, that they have not stolen some of the articles." Vol. iv. Desp. 5-6. The Provost-Marshal had authority given him by the Duke to punish on the spot the heinous crime of plundering provisions coming to the Army. Vol. iii. p. 405. There was no warrant for this in the Military Code till 1829. Chap. VIII.

[3] Art. 15 of 1717. The Officer was to be cashiered, but the Soldier to die as a Deserter, by sec. 15, Art. 23 of 1748.

[4] Art. 39 of 1717, and sec. 14, Art. 4 of 1748.

go from thence without leave before he shall be relieved; —— or who shall, without urgent necessity, quit his platoon or division; —— or

71. WHO, in the United Kingdom or British Isles, shall by discharging fire-arms, drawing swords, beating drums, or by any other means whatever, occasion false alarms in camp, garrison, or quarters; —— or

72.[1] WHO shall not, within *twenty-four hours* after the commitment of any prisoner, or as soon as he shall be relieved from his guard or duty, give in writing the prisoner's name and crime, and the name and rank of the officer or other person who committed him, to the officer commanding the garrison or regiment to whom he may be ordered to report; —— or

73. WHO, when in command of a guard, picquet, or patrole, shall, without proper authority, release any prisoner committed to his charge, or shall suffer him to escape; —— or

74. WHO shall unnecessarily detain[2] any prisoner in confinement, without bringing him to trial; —— or

75.[3] WHO shall neglect to obey any garrison or other orders;——

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, be LIABLE to be CASHIERED,—or suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded; —— and if a *non-commissioned officer* or *soldier*, shall, on conviction of any of the aforesaid offences, be punished according to the nature and degree of the offence by a *general, district, garrison, regimental,* or other court-martial.

DRUNKENNESS.

76.[4] IF any officer shall be drunk on any duty under arms, he shall, on conviction thereof before a *general* court-martial, be sentenced to be cashiered.

77.[5] IF any soldier shall be drunk, whether on duty or not on duty, he shall, on conviction thereof before any court-martial, in addition to, or without any such other punishment as the court may

[1] Art. 40 of 1717, and Chap. V. par. 55.
[2] Chap. V., par. 57.
[3] As to these, see Chap. I., pars. 10 and 27.
[4] Art. 36 of 1717, and sec. 14, Art. 5 of 1748. The consequences of employing a drunken Orderly of Dragoons in the Peninsular will occur to the readers of Napier. See also vol. iv. p. 386 of Despatches.
[5] As to stoppages of pay for this offence, see Lord Hardinge's Evidence, 'Military Punishments,' 1836, p. 303.

award, be liable to a fine not exceeding one pound, to be levied by stoppages from the offender's daily pay.

IF any soldier shall be drunk, whether on duty or not on duty, his commanding officer may, with or without any other lawful punishment, award him to pay a fine not exceeding ten shillings, such fine to be levied by stoppages from the offender's daily pay. Any soldier who shall object to such award on the ground of his innocence of the offence shall, if he so request, have a right to be tried by a *district* or *garrison* court-martial instead of submitting to such fine.

IN levying any fine or fines for drunkenness, whether imposed by a court-martial or a commanding officer, the stoppages from the offender's daily pay shall in no case exceed fourpence a day.

78. A *regimental* or *detachment* court-martial may try any non-commissioned officer on a charge of drunkenness not on duty, but shall not try any other soldier on such charge.

IF any soldier shall be drunk when not on duty, and it shall appear expedient to the commanding officer that such soldier by reason of previous offences of drunkenness should be brought before a *district* or *garrison* court-martial, he shall make application to the general officer commanding the district or station, who shall, if he shall so think fit, make order for the trial of such soldier, and such soldier being convicted of the act of drunkenness shall be liable to such punishments as the court may award.

IN every case where a soldier is found guilty by a court-martial of drunkenness, whether on duty or not on duty, the court shall, for the purpose of assisting their discretion in awarding punishment, receive evidence of all former entries of drunkenness against the prisoner in the regimental, company, battery, or other defaulters book.

DISGRACEFUL CONDUCT.

79. ANY officer who shall behave in a scandalous manner, unbecoming the character of an officer and a gentleman; —

SHALL, on conviction thereof before a *general* court-martial, be CASHIERED.

80.[1] ANY officer or soldier, or other person employed in the War Department, or in any way concerned in the care or distribution of any money, provisions, forage, arms, ammunition, clothing, or other stores belonging to our army, or for our use, who shall embezzle,

[1] Arts. 42 and 43 of 1717.

fraudulently misapply, wilfully damage, steal, or receive the same, knowing them to have been stolen, or shall be concerned therein, or connive thereat; ——

MAY, on conviction thereof before a *general* court-martial, be sentenced to *penal servitude* for any term of years not less than five, — or to such other punishment as shall accord with the provisions of the 17th section of the Mutiny Act; —— and on the trial of such offender, such court shall proceed in all particulars in accordance with the provisions of the said section; ——

AND such offender, on conviction thereof before a *district* or *garrison* court-martial, shall be liable to such punishments as the court may award.

81. ANY soldier who shall malinger, feign, or produce disease or infirmity, — or shall wilfully do any act, — or wilfully disobey any orders, whether in hospital or otherwise, thereby producing or aggravating disease or infirmity, — or delaying his cure; ——

Or who SHALL

WILFULLY maim or injure himself or any other soldier, whether at the instance of such other soldier or not, or cause himself to be maimed or injured by any other person, with intent thereby to render himself or such other soldier unfit for service; ——

Or who SHALL

TAMPER with his eyes, with intent thereby to render himself unfit for service; ——

Or who SHALL

STEAL any money or goods the property of a comrade, of a military officer, or of any military or regimental mess or band, or who shall receive any such money or goods knowing them to have been stolen; —— [1]

Or who SHALL

STEAL or embezzle Government money or property, or shall receive the same knowing them to have been stolen or embezzled; —— [1]

Or who SHALL

COMMIT any other offence of a felonious or fraudulent nature; —— [1]

[1] See Chap. III., par. 27.

Or who SHALL

BE guilty of any other disgraceful conduct of a cruel, indecent, or unnatural kind; ——

MAY, on conviction thereof before a *general, district,* or *garrison* court-martial, be sentenced to such punishments, other than death or penal servitude, as the court may award.

82. ANY soldier, whether on or off duty, who shall become maimed or mutilated or injured, except by wounds received in action, shall be forthwith brought before a court of inquiry;[1] —— and such court shall report their opinion whether such maiming or mutilating, or injuring was occasioned by design, and if the court shall report that the maiming or mutilating, or injuring was not occasioned by design, the soldier shall not be liable to be called to account in respect thereof; —— but if the court shall report their opinion that such maiming or mutilating was occasioned by the designed and wilful act of such soldier, or by any other person at the instigation of such soldier, with intent on the part of such soldier to render himself unfit for the service, and not by accident, in that case the soldier shall be forthwith put upon his trial before a *general, district,* or *garrison* court-martial on a charge for *disgraceful* conduct, and such soldier shall not be discharged from our service (unless specially directed by our Commander-in-Chief to be discharged), but shall be retained, and employed on such duties or military work[2] as we may from time to time direct, through the Commander-in-Chief of our forces; —— and the proceedings of such court of inquiry and of such court-martial shall be transmitted, through our Judge Advocate General, to our Commander-in-Chief, and afterwards by our Secretary of State for War to our Commissioners of Chelsea Hospital, in order that they may, when the case comes before them, have the best means of arriving at a just decision, either to grant or to withhold from such soldier a pension; —— or

83. ANY soldier who shall be convicted of having tampered with his eyes, with intent thereby to render himself unfit for service, — shall not be entitled to his discharge or to a pension; —— but shall be detained in an eye infirmary or military hospital, or shall be sent to his parish, or dismissed, according to our directions given from time to time to our Commander-in-Chief.

FALSE RETURNS.

84. ANY officer who shall, through design or culpable neglect, omit or refuse to make or send a return or report; —— or shall

[1] Chap. IX., par. 19. [2] Chap. II., par. 24.

make a return or report, to us, to the Commander-in-Chief of our forces, to our Secretary of State for War, or to any his superior officer, authorised to call for a return or report of the state of any regiment, troop or company, garrison or corps, under his command, knowing such return or report, or any statement therein, to be false; —— or

85.[1] WHO shall make a false muster of man or horse, or shall knowingly allow or sign any muster roll, pay list, certificate, or return wherein such false statement is contained, or any duplicate thereof; —— or who shall intentionally allow to be given any untrue documents, or conceal or omit the true facts directed to be stated, whereby to excuse any officer or soldier from muster or duty, by withholding the names of absent persons, or the true reasons and time of absence; —— or

86. WHO shall, by any false statement, certificate, or document, or omission of the true statement, attempt to obtain for any officer or soldier, or other person whatsoever, any pension, retirement, half pay, gratuity, sale of commission, exchange, transfer, or discharge; —— or

87. ANY officer or soldier who shall make or be privy to the making of any false entry, alteration, or erasure in any account, description book, attestation, record, register, discharge, or other document, whereby the real services, causes of discharge or disability, wounds, conduct of, or sentences of courts-martial upon, any person whatsoever, shall not be truly given, or who shall wilfully omit to report or record any other facts relating thereto, which it was his duty to have done in conformity with our regulations; —— or

88.[2] WHO shall intentionally give in any false return or report or statement whatsoever of arms, ammunition, clothing, money, stores, or any provisions belonging to us, or for the use of our forces; —— or who shall, by any false document, be concerned in or connive at any fraudulent embezzlement of the stores aforesaid, or who shall, by producing any false certificates or vouchers or accounts, or in any other way, misapply the public money for purposes other than those for which it was intended; —— or

89. WHO shall, by any concealment or wilful omission, attempt to evade the true spirit and meaning of our orders and regulations relating to the foregoing points; ——

[1] Art. 24 of 1717.

[2] Arts. 42 and 43 of 1717, and sec. 13 of Art., 1748.

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, before a *general* court-martial, be CASHIERED; ——

AND, if a *soldier*, shall, on conviction by a *general*, *district*, or *garrison* court-martial, be liable to suffer such punishments, other than death or penal servitude, as the court may award.

90. ANY officer who shall have signed certificates, returns, or forms of accounts in blank, before the paymaster, quarter-master, or other person concerned in making up the said documents has inserted therein the whole of the circumstances for which the officer's signature is to be a voucher; ——

SHALL, on conviction thereof, be LIABLE to be CASHIERED, — or suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded.

BILLETS AND CARRIAGES.

91.[1] ANY officer or soldier who shall demand billets for more than his effective men; —— or quarter wives and children or servants in houses, without the consent of the occupiers; —— or take money for freeing from billets; ——

SHALL, if an *officer*, on conviction thereof before a *general* court-martial, be CASHIERED; —— and, if a *soldier*, shall, on conviction thereof before a *general*, *district* or *garrison* court-martial, be liable to such punishments as shall accord with the provisions of the Mutiny Act and with the usage of our service.

92.[2] ANY officer or soldier who shall be guilty of any ill-treatment of landlords by violence, extortion, or making disturbances in billets; —— and any commanding officer who shall refuse or neglect to cause reparation to be made for such ill-treatment, after receiving proof of the justice of the complaint; —— and

93.[3] ANY officer commanding any corps or detachment who shall not take care that his own quarters and billets, and those of all officers and soldiers under his command, be cleared, and the accounts regularly settled at the end of every four days, or before the troops shall quit their quarters, if they do not remain four days; —— and

94.[4] ANY officer or soldier who shall permit carriages pressed for baggage to be overloaded, or shall permit the persons attending

[1] 4 Will. and Mary, c. 13, s. 28; and Art. 31 of 1717, and sec. 9 of 1748.
[2] Art. 34 of 1717. [3] Art. 30 of 1717. [4] Art. 33 of 1717.

them to be ill-treated, or to be forced to take upon their carriages (except on emergencies as provided for by law) any women, or any soldiers, other than the sick and lame; —— or who shall refuse to certify the sums due for carriages, and the name of the corps employing them; ——

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, be LIABLE to be CASHIERED, — or suffer such other punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded; —— and if a *non-commissioned officer or soldier*, shall, on conviction of any of the aforesaid offences, be punished, according to the nature and degree of the offence, by a *general, district, garrison, regimental*, or other court-martial.

RECRUITING.

95. EVERY person subject to these articles who shall wilfully contravene any of the provisions of the Mutiny Act, or the regulations of the service, in any matter relating to the enlisting or attesting of recruits, may be tried for such offence before a *general, district*, or *garrison* court-martial, and be sentenced to such punishments, other than death or penal servitude, as such court may award.

MISCELLANEOUS OFFENCES.

96. ANY officer or soldier who, on application being made to him for that purpose, shall wilfully neglect or refuse to deliver over to the civil magistrate,—or to assist[1] in the apprehension of officers or soldiers accused of crimes punishable by law; —— or

97. WHO shall protect any person from his creditors on the pretence of his being a soldier,—or who shall protect any soldier not actually doing duty as such in any manner not allowed by the Mutiny Act;——

SHALL, if an *officer*, on conviction of any one of the aforesaid offences before a *general* court-martial, be CASHIERED;——and, if a *soldier*, shall, on conviction thereof before a *general, district*, or *garrison* court-martial, be liable to such punishments as such courts may award.

98.[2] EVERY person subject to these articles who shall fight or

[1] Art. 18 of 1717. It is the common practice of all armies that, when a Soldier unknown has committed an outrage, whole Regiments are paraded to enable the complainant to point out the person against whom he complains. Desp., vol. v., p. 408. Chap. III., par. 23, *ante*. Truv. *v.* Marshall, *ante*.

[2] Art. 20 of 1717. In 1748, the person using provoking speech or gesture was

promote a duel, or take any steps thereto, or who shall not do his best to prevent a duel, shall,—if an officer, be liable to be CASHIERED, or to suffer such other punishments as a *general* court-martial may award; —— if other than an officer, shall be liable to such punishments as a *general, district,* or *garrison* court-martial may award.

99. EVERY officer whose character or conduct as an officer and gentleman has been publicly impugned, shall within reasonable time submit the case to his commanding officer, or to other competent military authority for investigation, on pain of suffering such punishment as a *general* court-martial may award.

100. ANY officer or non-commissioned officer who shall strike or otherwise ill-treat any soldier; —— or

101.[1] ANY soldier who shall hire, or any officer or non-commissioned officer who shall connive at a soldier hiring, another person to do his duty for him; —— or

102.[2] ANY soldier who shall pawn, sell, lose by neglect, make away with, or wilfully spoil his arms, accoutrements, or necessaries, —or any extra article of clothing or equipment that he may have been put in possession of and ordered to wear, on the recommendation of the surgeon, for the benefit of his health; or spoil or wilfully deface or make away with or pawn his medal granted him for service in the field, or for general good conduct by our order, or by order of the late East India Company;—or sell, lose by neglect, make away with, or ill-treat his horse; —— or

103.[3] ANY officer or soldier who shall commit any waste or spoil, either in walks of trees, parks, warrens, fishponds, houses, or gardens, vineyards, olive groves, corn fields, enclosures, or meadows; —— or shall maliciously destroy any property; —— whether belonging to our own subjects, or to inhabitants of other countries; —— unless the destruction of property shall be ordered by the Commander-in-Chief of our forces, to annoy rebels[3] or other enemies in arms against us; ——

SHALL, if an *officer*, on conviction of any one of the aforesaid offences, be LIABLE to be CASHIERED,—or suffer such other

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to ask pardon in the presence of the Commanding Officer. See the Debate on this Article in 1844. 73 H. D. (3), p. 762; and W. O. Cir., 18 April, 1844.

[1] Art. 38 of 1717; and sec. 14, Art. 7 of 1748. [2] Arts. 42 and 43 of 1717.

[3] This was inserted in the Articles of 1685 as to Rebels. Art. 30 of 1717; and sec. 14, Art. 16 of 1748. The power of the Commander-in-Chief under this Article assumes a state of Rebellion to exist. Is such a power now needed? Chap. I., par. 15.

punishment, according to the nature and degree of the offence, as by the judgment of a *general* court-martial may be awarded; —— and, if a *non-commissioned officer or soldier*, shall, on conviction of any of the aforesaid offences, be punished, according to the nature and degree of the offence, by a *general*, *district*, *garrison*, *regimental*, or other court-martial.

104. IF any person subject to the Mutiny Act attempt to commit suicide, he shall be liable to be tried by a court-martial; —— and, upon conviction, he shall be liable, if an officer, to be cashiered, and, if a soldier, to suffer imprisonment, with or without hard labour.

105.[1] AND all crimes not capital,—and all acts, conduct, disorders, and neglects,—which officers and soldiers, and other persons subject to these our Articles of War, may be guilty of, to the prejudice of good order and military discipline, — though not specified in the foregoing cases, or in these our Articles of War,— shall be taken cognizance of by courts-martial, according to the nature and degree of the offence, and the offender shall suffer such punishment as the court may award.

SECTION III.

COURTS-MARTIAL.

COMPOSITION OF COURTS-MARTIAL.

106.[2] A *general* court-martial, if convened in the United Kingdom, the East Indies, Malta, or Gibraltar, shall consist of not less than *nine*,—if convened in Nova Scotia or Bermuda, of not less than *seven*,—and if convened in any other colony, or in any place beyond our dominions, of not less than *five* commissioned officers, each of whom shall have held a commission for three years before the assembling of the court. No field officer shall be tried by any person under the degree of a captain.

107. ANY officer commanding any detachment or portion of our troops, which may at any time be serving in any place beyond seas where it may be found impracticable[3] to assemble a general court-

[1] The Devil's Article, according to Lord Hardinge. Military Punishments 1836, p. 297. It was not in recent Articles prior to 1748 (see sec. 20, Art. 3).

[2] Sec. 15, Art. 2 of 1748. By 21 Geo. II. c. 6, s. 4, three Officers had jurisdiction.

[3] Note on sec. 10 of Mutiny Act, *ante*.

martial, upon complaint made to him of any offence committed against the property or person of any inhabitant of or resident in any such countries by any person serving with or belonging to our armies, under his immediate command, may assemble a *detachment general* court-martial of not less than *three* commissioned officers of any corps to try any such person, notwithstanding any such officer shall not have received any warrant empowering him to assemble courts-martial.

108. A *district* or *garrison* court-martial, if convened in the United Kingdom, the East Indies, Malta, or Gibraltar, shall consist of not less than *seven*,—if convened in Nova Scotia or Bermuda, of not less than *five*,—and if convened in any other colony, or in any place beyond our dominions, of not less than *three* commissioned officers.

109. EVERY *district* or *garrison* court-martial may be composed of any officers of different corps, and of officers of our Royal Artillery, and Engineers, and Royal Marines, and of officers of the general staff, whose appointments have been duly notified in general or garrison orders, provided such officers are in the receipt of their full pay on the staff, and are themselves amenable to military law, although on the half pay of their regimental rank; —— or, except for the trial of warrant officers, may be entirely composed of officers of the same regiment, assembled by order of the senior officer on the spot.

110. EVERY *district* or *garrison* court-martial shall be assembled in conformity with the orders of the officer under whose command the corps is placed, who will previously regulate the holding of courts-martial within his command, delegating or withholding the power to commanding officers to convene *district* or *garrison* courts-martial as he may deem to be most expedient, or as our commander of the forces may direct.

111. A warrant-officer[1] may be tried by a *district* court-martial, to be appointed by the general officer commanding our forces in the district where the corps shall be situated, if in the United Kingdom, and if elsewhere, by the officer commanding in chief on the station; —— and such court-martial, if convened in Bermuda, the Bahamas, the Cape of Good Hope, the settlements in southern or the western coast of Africa, Saint Helena, British Columbia, Vancouver's Island, Jamaica, Honduras, Newfoundland, New Zea-

[1] Formerly these were applied by the Board of Ordnance (by Warrant), Vol. I., p. 8.

land, the Australian colonies, the Windward and Leeward Islands, British Guiana, Hong Kong, the Prince of Wales Island, Singapore, Malacca, or in the settlements on the coast of China, or in the East Indies, may consist of five, and if convened elsewhere shall consist of not less than seven, commissioned officers, and of such officers not more than *two* shall be taken from the regiment in which the warrant officer to be tried is serving; —— and no more than *two* of the members shall be under the degree of a captain.

112. THE commissioned officers of every regiment, battalion, or regimental depôt, or of a detachment of ordnance corps, or of the Army Service Corps, commanded by an officer not under the rank of captain, may, by the appointment of their colonel or commanding officer, without other authority than these our Rules and Articles of War, hold *regimental*[1] courts-martial consisting of not less than *five* officers (unless it be found impracticable[1] to assemble that number, when *three* shall be sufficient); —— and may inquire into such disputes or criminal matters as may come before them; —— and the commanding officer shall in no case be a member of such court.

WHEN the depôt of a regiment or battalion is attached for duty to another regiment or battalion, the officers of both such depôt and of the regiment or battalion to which it is attached, shall be deemed to be officers of one and the same regiment for the purposes of the trial by regimental court-martial of prisoners belonging either to such regiment or battalion, or any depôt attached thereto.

113. THE commissioned officers of any detachment or portion of our troops, which may at any time be serving in any part of our dominions, or elsewhere, or may be embarked on board a transport ship, convict ship, merchant vessel, or troop ship not in commission, although such detachment or portion of our troops shall consist of men from different regiments, may, by the appointment of the senior officer in command of the detachment, district, station, garrison, barrack, island, or colony, provided he be not under the rank of a captain, or in case such troops shall be on board any transport ship, convict ship, merchant vessel, or troop ship not in commission, by the appointment of the senior officer on board, whatever be his rank, without any other authority than these our Articles of War, hold *detachment* courts-martial, within our dominions, or elsewhere, consisting of not less than five officers (unless it be found impracticable[2] to assemble that number, when

[1] Chap. V., par. 12. [2] Note on sec. 10 of Mutiny Act, *ante*.

three shall be sufficient); —— and may inquire into such disputes or criminal matters as may come before them, according to the rules and limitations observed by *regimental* courts-martial.

114. THE president of every court-martial shall be appointed by or under the authority of the officer convening such court, and shall in no case be the confirming officer, or the officer whose duty it has been to investigate the charges on which the prisoner is to be arraigned;[1] —— nor in the case of a general court-martial, or of a district court-martial for the trial of a warrant officer, under the degree of a field officer, unless a field officer cannot be had; —— nor in any case whatever under the degree of a captain, save in the case of a detachment general court-martial, or of a regimental or detachment court-martial holden on the line of march, or on board any transport ship, convict ship, merchant vessel, or troop ship not in commission, or at any place where a captain cannot be had: ——

IN the case of a detachment general court-martial, the officer convening such court may be the president thereof.

115. A *general* court-martial may sentence any officer or soldier to suffer death, penal servitude, imprisonment, forfeiture of pay or pension, or any other punishment which shall accord with the usage of the service.

116. NO sentence of *death* shall pass without the concurrence of *two thirds* at the least of the officers present. —— No sentence of penal servitude shall be for a period of less than five years; and no sentence of imprisonment shall be for a period longer than two years.

117. NO court-martial, other than a *general* court-martial, or a *detachment general* court-martial having the same powers as a general court-martial, shall have power to pass any sentence of death or penal servitude.

ANY *general*, *district*, or *garrison* court-martial may, in addition to any other punishment which such court may award, sentence any offender to all or any of the following forfeitures:

To forfeit absolutely or for any period not less than eighteen months any good-conduct badge or any good-conduct pay which such offender may have earned by past service:

To forfeit any annuity, gratuity, medal, or decoration which may have been granted to him:

[1] Chap. VI., par. 14.

To forfeit any advantage as to pension which he may have earned by past service:

To forfeit all right to good-conduct pay and to pension on discharge, whether in respect of past or future service:

Such court may also, in addition to any other lawful punishment, sentence any offender to be discharged from our service with ignominy.

*118. NO court-martial shall, for any offence whatever during a time of peace within the Queen's dominions, have power to sentence any soldier to corporal punishment; provided that any court-martial may sentence any soldier to corporal punishment while on active service in the field or on board any ship not in commission, for mutiny, insubordination, desertion, drunkenness on duty or on the line of march, disgraceful conduct, or any breach of the Articles of War; and no sentence of corporal punishment shall exceed fifty lashes.[1]

*119. A *general, district* or *garrison* court-martial may, in addition to any sentence of corporal punishment, award imprisonment, with or without hard labour, and with or without solitary confinement.

120. ANY confirming officer may commute a sentence of corporal punishment to imprisonment for any period not exceeding forty-two days, with or without hard labour and with or without solitary confinement; —— or may mitigate it, either by reducing the number of lashes, or by awarding, instead of such sentence, an imprisonment for any period not exceeding twenty days, with or without hard labour, and with or without solitary confinement, and corporal punishment to be inflicted in the prison, not exceeding twenty-five lashes.

THE solitary confinement awarded in commutation of a sentence of corporal punishment shall in no case exceed seven days at a time, with intervals of not less than seven days between each period of such confinement.

121. WHEN any court-martial shall award a sentence of imprisonment, and shall direct that such imprisonment shall be solitary confinement only, the period of such solitary confinement shall in no case exceed fourteen days.

122. IN situations in which it may be impracticable to put in execution sentences of solitary confinement, the convening officer will give the court instructions to that effect, and the court in awarding a sentence of imprisonment is hereby directed to have regard to such instructions.

[1] Chap. III., par. 40.

123. NO sentence of a *general* court-martial shall be put in execution till after a report shall have been made of the whole proceedings to us;[1]—— or to the officer commanding in chief; —— or to some other person duly authorized by us, under our sign manual, or by warrant granted in pursuance of authority under our sign manual, to confirm the same, and until our or his directions shall have been signified thereupon; —— and no sentence of death shall be carried into effect in any of our colonial possessions until it shall have been approved in our behalf by the civil governor or person administering the civil government.

124. A *detachment general* court-martial shall have the same powers in regard to sentence upon offenders as a *general* court-martial; —— but no sentence of a *detachment general* court-martial shall be executed until the general commanding the army of which the division, brigade, detachment, or party forms part, and to which any person so tried, convicted, and adjudged shall belong, shall have approved and confirmed the same.

125. A *general* court-martial may sentence a commissioned officer to loss of army or regimental rank, in addition to any reprimand or other punishment which it may award, by reducing him, if under the rank and degree of a field officer, to the bottom of or to any other place on the list of the regimental rank in which he may be serving; —— or if a superior officer, to the last or any other place on the list of the army rank in which he may be serving; —— and in all cases where the officer so sentenced to loss of rank holds army as well as regimental ranks, the loss of rank may be inflicted in either or both of those ranks; —— and such court may sentence such officer to be imprisoned, with or without hard labour, in any case in which the court shall be authorized by law, and shall deem it necessary, to adjudge such punishment; —— but it shall not have power to sentence such officer to be suspended from doing duty, or from pay. With respect to officers of our Indian staff corps, a general court-martial may sentence any such officer to forfeit all or any part of his army or staff service, or all or any part of both.

*126. A *general*, *district*, or *garrison* court-martial may sentence any soldier to imprisonment, with or without hard labour, and may also direct that such offender shall be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding fourteen days at a time nor eighty-four days in any one period of three hundred and thirty-six days, with intervals between the

[1] This was the 52nd Article of William III.'s Articles of War; and see Article 20 of 1742. Chap. VII., pars. 18 and 29.

periods of solitary confinement of not less duration than such periods of solitary confinement; —— and when the imprisonment awarded shall exceed eighty-four days, the court shall expressly order that the solitary confinement shall not exceed seven days in any twenty-eight days of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

*127. NO sentence of a *district* or *garrison* court-martial shall be put in execution till it has been confirmed by the general officer, governor, or senior officer in command of the district, garrison, island, or colony.

128. A warrant officer may be tried by a *district* or *garrison* courts-martial, and may be sentenced to be dismissed from the service, or to be suspended from rank and pay and allowances for any stated period, or to be reduced to the bottom or any other place in the list of the rank which he may hold, or to be reduced to an inferior class of warrant officer, or, if he was originally enlisted as a private soldier, and continued in the service until his appointment to be a warrant officer, to be reduced to the rank of a private soldier, or to be remanded to regimental duty in the rank held by him immediately before his appointment to be a warrant officer.

A warrant officer may be sentenced by a *general* court-martial to these and to such other punishments as such court is competent to award.

A warrant officer shall in no case be liable to corporal punishment.

THE government of any of the presidencies in India may reduce any warrant officer serving in or belonging to such presidency to a lower grade of warrant rank, or may remand any such warrant officer to regimental duty in the rank held by him immediately previous to his appointment to be a warrant officer.

A hospital apprentice in India may be sentenced by a *general*, *district* or *garrison* court-martial to be suspended from rank and pay and allowances for a stated period, or to be reduced to the lowest or any other place in the list of hospital apprentices, or to both of these punishments in conjunction, or to be dismissed from the service.

*129. A *regimental* or *detachment* court-martial may sentence any soldier to imprisonment, with or without hard labour for any period not exceeding forty-two days, and may also direct that such soldier may be kept in solitary confinement, for any portion or portions of such imprisonment, not exceeding fourteen days at a time, with an

interval between them of not less duration than such period of solitary confinement; ——but no sentence shall be executed until the commanding officer shall have confirmed the same;[1] nor shall any sentence of a *detachment* court-martial having the same powers only as a *regimental* court-martial be executed, until the superior officer on the spot, not being a member of the court, shall have confirmed the same.

*130. IN addition to any other punishment which the court may award, a court-martial may further sentence any offender to be put under stoppages of pay until he shall have made good —

Any money or articles issued to him in respect of his fraudulent enlistment, or by reason of any fraudulent misrepresentation or concealment on his part:

Any loss or damage occasioned by him in any instance of disgraceful conduct:

Any loss or destruction of, or damage or injury to, any property whatsoever, occasioned by his wilful or negligent misconduct:

Any medal or decoration for service in the field or for general good conduct which may have been granted to him by our order, or any medal or decoration which may have been granted to him by any foreign power, which medal or medals he may have been authorized to wear, and may have made away with or pawned:

Any loss, destruction, or damage of his horse, arms, clothing, instruments, equipments, accoutrements, or regimental necessaries; —— or of those of any officer or soldier; —— or of any extra article of clothing of equipment that he or any other soldier may have been put in possession of and ordered to wear on the recommendation of the surgeon:

Any expense necessarily incurred by his drunkenness or other misconduct.

*131. EXCEPT in the case of the loss, destruction, or damage of any arms, clothing, instruments, equipments, accoutrements, or regimental necessaries, in which case the court may by its sentence direct that the said stoppages shall continue till the cost of replacing the same be made good, the amount of any loss, destruction, damage, or expense shall be ascertained by evidence, and the offender shall be placed under stoppages for such an amount only as shall be proved to the satisfaction of the court.

*132. SO much only of the pay of the soldier may be stopped and applied as shall, after satisfying the charges for messing and washing, leave him a residue of at the least one penny a day.

[1] Chap. V., par. 12.

133. WHEN an offender is put under stoppages for making away with or pawning any medal or decoration, the amount shall be credited to the public, but the medal or decoration in question shall not be replaced except under special circumstances, to be determined by the Commander-in-Chief, with the concurrence of our Secretary of State for War.

134. WHEN any person subject to these articles has been sentenced by a court-martial to stoppages of pay, it shall be lawful for our Commander-in-Chief, with the concurrence of our Secretary of State for War, to remit the whole or any portion of such stoppages in any case where such remission may appear to be conducive to the good of our service.

*135. IN case of mutiny or insubordination accompanied with personal violence, or other offences committed on the line of march, or on board any transport ship, convict ship, merchant vessel, or troop ship not in commission, the offender may be tried by a *regimental* or *detachment* court-martial, and the sentence confirmed and carried into execution on the spot by the officer in the immediate command of the troops, not being a member of the court; —— but the sentence shall not exceed that which a regimental court-martial is competent to award; —— and any sentence, so confirmed, shall be noticed in the monthly return of courts-martial sent in to our adjutant-general, and, if on the line of march, reported to the general commanding.

*136. NO *regimental* court-martial shall try any soldier for absence without leave, if the absence has exceeded the period of *twenty-one days*, without the permission of the general or other officer commanding the brigade, district, or garrison; —— nor shall try any soldier for desertion.

*137.[1] A *non-commissioned officer* not being an army schoolmaster may be reduced to the ranks by the sentence of a *regimental* or other court-martial; —— or by the order of the Commander-in-Chief, or the colonel, or in the militia the appointed commandant, of the regiment or corps. —— An army schoolmaster may be sentenced to dismissal or loss of service, but not to reduction. —— The words Commander-in-Chief in this article shall include the Com-

[1] This reduction abroad was the subject of Barwis *v.* Keppel, 2 Wil. Rep., p. 314. Art. 27 of 1717; and sec. 15, par. 16 of 1748, related to it. The Mutiny Act, 1746, sec. 30, gave the power to a Regimental Court only; by section 16 of 1748 the Colonel also had the power—but not the C. O. for the time being, after Circular 442 of 27 Dec., 1826. In 1830 the power was given by section 74 to H. M. through the Commander-in-Chief; and in 1854 and 1855 alterations were made, as seen by comparing section 127 in each Act. Vol. I. p. 28.

mander-in-Chief of our forces in India, and the Commander-in-Chief of our forces in each of the presidencies in India.

138. WHENEVER sentence shall be passed by a court-martial on an offender already under sentence, either of imprisonment or penal servitude, the court may award sentence of imprisonment or penal servitude for the offence for which he is under trial to commence at the expiration of the imprisonment or penal servitude to which he shall have been so previously sentenced, although the aggregate of the terms of imprisonment or penal servitude respectively may exceed the term for which any of those punishments could otherwise be awarded.

WHENEVER Her Majesty, or any general or other officer authorized to confirm the sentences of courts-martial, shall commute a sentence of penal servitude or corporal punishment to imprisonment, and the offender whose sentence shall be so commuted shall at the time of such commutation be under sentence of imprisonment or penal servitude, it shall be lawful for Her Majesty, or the general or other officer who shall so commute such sentence, to direct that such commuted sentence of imprisonment shall commence at the expiration of the imprisonment or penal servitude to which such prisoner shall have been so previously sentenced, although the aggregate of the term of imprisonment or penal servitude respectively may exceed the term for which any of those punishments could be otherwise awarded.

139. EXCEPT in the cases mentioned in the preceding article, every term of penal servitude, or of imprisonment under the sentence of a court-martial, whether original or revised, shall be reckoned as commencing on the day on which the original sentence and proceedings shall be signed by the president:[1] —— The place of imprisonment under the sentence of *general* courts-martial shall be appointed by the officer commanding the district, garrison, island, or colony in which the court may be held;[2] —— and under the sentence of any other court-martial, shall be appointed by the officer confirming the proceedings of such court-martial; —— and in default of such appointment, then the place of imprisonment shall be appointed by the officer commanding the regiment or corps to which the prisoner belongs or is attached.

*140.[3] NO commanding officer shall, by giving in against a prisoner vague and indefinite charges, try before a *regimental* court-martial grave offences, which are directed to be tried by *general*, *district*, or

[1] Chap. VI., par. 72. [2] Chap. VII., par. 19.
[3] Inserted as 91 Art. of 1829; and Chap. VI., par. 8.

garrison courts-martial; —— BUT as it may be advisable that some of the foregoing offences, which in certain cases may admit of less serious notice, should be tried by *district, garrison, regimental,* or *detachment* courts-martial,—in such cases the officer commanding the battalion, corps, or detachment, who may deem it advisable so to proceed, shall lay a statement of the case, together with the charge he intends to bring, before the general or other officer commanding the brigade, district, or garrison, with an application so to proceed.—— The general or superior officer will exercise his discretion in directing the description of court by which the offender shall be tried, but the permission to try grave offences by a *district, garrison, regimental,* or *detachment* court-martial shall be recorded in the heading of the proceedings of such court as well as noticed in the monthly return of courts-martial sent in to our adjutant-general.

141. IN all places other than the United Kingdom or British Isles, whenever the punishment of death shall have been awarded by a *general* or a *detachment general* court-martial, the officer commanding in chief Her Majesty's forces there serving, instead of causing such sentence to be carried into execution, may order the offender to be kept in penal servitude for any term not less than five years, or to suffer such term of imprisonment, with or without hard labour, and with or without solitary confinement, such solitary confinement not exceeding the periods prescribed in the 126th article, as shall seem meet to the officer commanding as aforesaid.

142. IN all places other than the United Kingdom or British Isles, whenever a sentence of penal servitude shall have been awarded by a *general* or *detachment general* court-martial, the officer commanding in chief Her Majesty's forces there serving, instead of causing such sentence to be carried into execution, may order the offender to suffer imprisonment (with or without hard labour, and with or without solitary confinement, such solitary confinement not exceeding the periods prescribed in the 126th article), for such term not exceeding two years as shall seem meet to the officer commanding as aforesaid.

TRIAL OF CIVIL OFFENCES BY COURT-MARTIAL IN PLACES WITHIN OUR DOMINIONS BEYOND SEAS, OTHER THAN THE EAST INDIES, WHERE THERE IS NO CIVIL JUDICATURE.

143.[1] ANY officer or soldier who may be serving in any place within our dominions beyond the seas (excepting India), where

[1] Art. 46 of 1717. In America the offenders were to be held in custody till charged before a Civil Magistrate. 5 Geo. III., c. 33. Rex *v.* Suddis, 1 East. Rep., p. 317.

there is no civil judicature in force, by our appointment, or under our authority, competent to try such offenders, or who may be serving in our garrison of Gibraltar, and who shall be accused of treason, or of any other civil offence, which, if committed in England, would be punishable by a court of ordinary criminal jurisdiction, and not by a court-martial, shall be tried by a *general* court-martial appointed by the officer commanding in chief in such place as aforesaid for the time being; —— and if found guilty, shall be liable, in the case of an offence which, if committed in England, would be capital, to suffer DEATH, or such other punishment as by the sentence of such *general* court-martial shall be awarded; —— and in the case of any other offence, to suffer such punishment other than death as by the sentence of such *general* court-martial shall be awarded; —— no such punishment, nevertheless, to be of such a nature as shall be contrary to the usages of English law in regard to the punishment of offenders, or to be carried into effect until such officer commanding in chief as aforesaid shall have confirmed the same; —— and in all cases where such court-martial shall have convicted any such officer or soldier of any offence punishable with death, it shall be lawful for such court-martial, instead of sentencing the offender to death, to adjudge him to be kept in penal servitude for a term of not less than five years; —— and we hereby reserve to ourselves the power, in all cases where a sentence of death shall have been pronounced on any officer or soldier by any general court-martial as aforesaid, instead of causing such sentence to be carried into execution, to order the offender to be kept in penal servitude, or to be imprisoned, with or without hard labour, for such period of time as, on consideration of all the circumstances of the case, shall seem to us to be most just and fitting.

TRIAL OF CIVIL OFFENCES IN THE EAST INDIES.

144. [*See* Mutiny Act, Section 101.]

TRIAL OF CIVIL OFFENCES IN PLACES OUT OF OUR DOMINIONS.

145. ANY officer or soldier who may be serving with our forces out of our dominions, who shall be accused of treason, or of any other civil offence which, if committed in England, would be punishable by a court of ordinary criminal jurisdiction,[1] and not by a court-martial, shall be tried by a general court-martial, appointed by the general or other officer having power to appoint

[1] Chap. III., par. 25.

courts-martial in such place for the time being, and if found guilty shall be liable, in the case of an offence which, if committed in England, would be capital, to suffer death, or such other punishment as by the sentence of such general court-martial shall be awarded; —— and in the case of any other offence to suffer such punishment other than death as by the sentence of such general court-martial shall be awarded; —— no such punishment, nevertheless, to be of such a nature as shall be contrary to the usages of English law[1] in regard to the punishment of offenders, or to be carried into effect until confirmed by the general or other officer by whom or under whose authority such court-martial was appointed; —— and in all cases where such court-martial shall have convicted any such officer or soldier of any offence punishable with death, it shall be lawful for such court-martial, instead of sentencing such offender to death, to adjudge him to be kept in penal servitude for a term of not less than five years; —— and in all cases where such court-martial shall sentence any officer or soldier to death, it shall be lawful for the general or other officer commanding our said forces in chief, by whose authority from us such court-martial was assembled, instead of causing such sentence to be carried into execution, to order such officer or soldier to be kept in penal servitude, or to be imprisoned, with or without hard labour, for such period of time not exceeding two years as to him shall seem meet: ——And in the case of a commissioned officer no sentence of death or penal servitude shall be carried into effect until confirmed by the officer commanding in chief the said forces. —— But as it may be expedient to hold detachment general courts-martial for the trial of such of the civil offences aforesaid as are provided for in the 12th section of the Mutiny Act, the provisions of this article shall not be deemed to affect the jurisdiction of detachment general courts-martial in such cases; —— and those courts shall in such cases have the same powers as are granted by this article to general courts-martial; —— and the general or other officer commanding our said forces in chief as aforesaid shall have the same powers as regards detachment general courts-martial as are conferred on him by this article in regard to general courts-martial.

MIXTURE OF OFFICERS.

146. WHERE it is necessary or expedient, a court-martial, composed exclusively of officers of our army, or of officers of our royal marines, or of officers of both those services, whether the commanding officer by whose order such court-martial is assembled

[1] Chap. VI., par. 70.

belongs to our land or to our marine forces,[1] may try a person belonging to either of these services. —— When the person to be tried shall belong to our army, then the proceedings of such court shall be regulated as if the court were composed of officers of our army only, and the provisions of the Mutiny Act and Articles of War for our army shall be applicable to the proceedings of such court: —— When the person to be tried shall belong to our royal marines, then the proceedings of such court shall be regulated as if the court were composed of officers of our land forces only, except that the provisions of such Act and Articles of War as shall be in force for the regulation of our royal marine forces while on shore shall be applicable.

147.[2] IT is our will and pleasure that *general* courts-martial upon officers and soldiers of our regiments of life guards or horse guards, for differences arising purely among themselves, or for crimes relating to discipline or breach of orders, shall be composed of officers serving in any or all of those corps (as they may be most conveniently assembled), and they are to take rank according to their commissions.

IN like manner also, the officers of our three regiments of foot guards shall, for similar purposes, of themselves compose courts-martial, and take rank according to their commissions.

148. ALL courts-martial arising out of disputes between our life guards or horse guards and our foot guards, or between either of those corps of guards and any of our other forces, or different corps of our other forces, shall be equally composed of officers belonging to the corps in which the parties complaining and complained of do then serve; —— and the president shall be taken by turns as nearly as our service will with convenience admit, beginning first by an officer of one of our regiments of life guards, and so on in course out of the other corps, according to the seniority in rank of such corps respectively.

149. WHEN any proportion of our regiments of life guards, horse guards, or foot guards shall be serving on detached duty, offenders belonging thereto shall be tried by courts-martial to be assembled by any governor or commander of a district, garrison, fort, castle, or barrack, and to be composed of officers of different corps, provided that no less than a moiety of the officers shall

[1] By 5 Geo. III., c. 7, s. 77, the Royal Marines were to sit in order of date of their Commissions; and by 26 Geo. III., c. 10, s. 80, the Officers of the E. I. Co. were joined in Court-martial duty.

[2] Sec. 15, Art. 3 of 1748.

belong to our life guards, horse guards, or foot guards respectively, if so many are on the same duty, or can be conveniently assembled.

150.[1] THE officers of artillery shall, for differences arising amongst themselves, or in matters relating solely to their own corps, have courts-martial composed of their own officers; —— but where a sufficient number of such officers cannot be assembled, or in matters wherein other corps are interested, they shall sit in courts-martial with the officers of our other corps, taking rank according to their commissions.

151. NO officer serving in the militia shall sit in any court-martial upon the trial of any officer or soldier serving in any of our other forces; —— nor shall any officer in our other forces sit in any court-martial upon the trial of any officer or soldier serving in the militia.

PROCEEDINGS.

152. IN all trials by courts-martial, as soon as the president and other officers appointed to serve thereon shall be assembled, their names shall be read over in the hearing of the prisoner, who shall thereupon be asked if he objects to being tried by the president or by any of such officers[2]; —— and if the prisoner shall then object to the president, such objection, unless disallowed by two thirds at least of the other officers appointed to form the court, shall be referred to the decision of the authority by whom such president shall have been appointed; —— but if he object to any officer other than the president, such objection shall be decided by the president and the other officers appointed to form the court; —— and when the place of the president or other officer in respect of whom any challenge shall have been made and allowed shall be supplied by some officer in respect of whom no challenge shall have been made or allowed, or if no challenge shall have been made, or if made not allowed, the president and other officers composing a general court-martial shall take the following oath before the judge advocate[3] or person officiating as such; —— and on trials by other courts-martial the same oath shall be administered by the president to the other members; —— and afterwards by any sworn member to the president:

[1] Sec. 19, Art. 2 of 1748.

[2] This right of challenge was secured to the Prisoner in 1847. Chap. VI., par. 17.

[3] Art. 22 of 1717. By Art. 20 of 1742 the Judge-Advocate-General was to inform and prosecute; and by sec. 15, Art. 6 of 1748, to prosecute in H. M.'s name.

YOU shall well and truly try and determine according to the evidence in the matter now before you.[1]

So help you GOD.

You shall duly administer justice, according to the rules and articles for the better government of Her Majesty's forces, and according to an Act now in force for the punishment of mutiny and desertion, and other crimes therein mentioned, without partiality, favour, or affection;[2] *and if any doubt shall arise, which is not explained by the said Articles or Act, then according to your conscience, the best of your understanding, and the custom of war in the like cases: And you shall not divulge*[3] *the sentence of the court until it shall be duly approved; neither shall you upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, or a court-martial, in due course of law.*

So help you GOD.

AND as soon as the said oaths shall have been administered to the respective members, the president of the court shall administer to the judge advocate[4] or person officiating as such at courts-martial an oath in the following words:

I A.B. *do swear that I will not, upon any account whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, or a court-martial, in due course of law; and that I will not, unless it be necessary for the due discharge of my official duties, disclose the sentence of the court until it shall be duly approved.*

So help me GOD.

153. EVERY person, as well civil as military, who may be required to give or produce evidence before a court-martial shall, in the case of a general court-martial, be summoned by the judge advocate general, or his deputy, or the person officiating as judge advocate; —— and in the case of all other courts-martial by the president of the court; —— and all persons who give evidence before any court-martial, other than those who are by law empowered to make a solemn affirmation, are to be examined upon oath in the following words:

[1] In the Mutiny Act prior to 1773, these words were added ["between our Sovereign Lord the King's Majesty and the Prisoner to be tried"].

[2] The Arts. of War in Anne's reign swore the Members against bribery. Bruce (1717), p. 308. As to this oath, Chap. VI., pars. 19 and 23.

[3] Secrecy was imposed by the Arts. of Queen Anne. It is not found in 1717, but is in Art. 20 of 1742; and sec. 15, Art. 7 of 1748. The oath was sanctioned by 22 Geo. II., c. 5, s. 6.

[4] By 22 Geo. II., c. 5, s. 7.

THE evidence which you shall give before this court shall be the truth, the whole truth, and nothing but the truth.

So help you GOD.[1]

*154. AFTER any person subject to these articles has been found guilty by court-martial of any offence, the court may, for the purpose of assisting their discretion in awarding punishment for the offence, receive evidence of former convictions against the prisoner, whether convictions by court-martial, or convictions by a court of ordinary criminal jurisdiction.[2]——The court, however, shall not in any case award any other punishment than may be legally awarded for the particular offence of which the prisoner has been found guilty.

155. ANY previous conviction by court-martial may be proved by the entry thereof in the court-martial book or defaulter book, or by certified copy of such entry.

156. ANY previous conviction by a court of ordinary criminal jurisdiction may be proved by the production of the certificate provided for in the 39th section of the Mutiny Act, or by certified copy of such certificate, or by the entry of such conviction in the court-martial book or defaulter book, or by certified copy of such entry.——No entry of a conviction by a court of ordinary criminal jurisdiction shall be made in the court-martial book or defaulter book, except upon such certificate as aforesaid.

157. [3] EVERY judge advocate or person officiating as such at a general court-martial shall transmit, with as much expedition as may be, the original proceedings, and sentence thereof, to the Judge Advocate General in London, in whose office they shall be carefully preserved: —— And the president of every district or garrison court-martial shall in like manner transmit the proceedings and sentence thereof: —— But the proceedings of district and garrison courts-martial need not be preserved after the expiration of a period of three years from the date of their deposit in the office of the Judge Advocate General.

158. [3] ANY person tried by a general, district, or garrison court-martial, or any person on his behalf, shall be entitled, on demand made within the space of three years from the date of the final decision on the proceedings, to a copy of such proceedings and sentence (paying for the same at the rate of fourpence per folio of seventy-two words), whether such sentence shall be approved or not

[1] Chap. VI., par. 50. [2] Chap. VI., par. 65. [3] Chap. VII., par. 24.

as soon after the receipt of the proceedings at the office of the Judge Advocate General as such copy can conveniently be supplied.

159. [1] NO person acting as prosecutor or being a witness for the prosecution shall also act as judge advocate at a trial.

160. TRIALS shall be held between the hours of *eight* in the morning and *four* in the afternoon, except in India, where trials may be held between the hours of *six* in the morning and *four* in the afternoon:——

PROVIDED, that if the court considers it necessary, they may continue any trial beyond the hour of *four* in the afternoon, recording in the proceedings their reason for so doing:——

PROVIDED also, that in cases requiring an immediate example, or when the general or other officer commanding any body of troops shall certify under his hand that the same is expedient for the public service, trials may be held at any hour.

WHEN it shall appear to the officer convening a court-martial, either before or after the assembling of the court, that it is desirable that the court or some members thereof should have a view of any place in order to their better understanding the evidence that may be given upon the trial, such officer may direct the court, or so many members thereof as he shall think fit, to view such place.

161. NO person shall use menacing words, signs, or gestures in presence of a court-martial; [2] or shall cause any disorder or riot, so as to disturb the proceedings of the court, or shall commit any other contempt of the said court, under the penalty, if an officer or soldier, of being punished at the discretion of the said court, or by a court of superior power, and if a civilian, of being taken before a civil magistrate to be punished according to law.[3]

162. ALL the members of a court-martial are to behave with decency;—— to take their seats according to rank, and not quit them without permission of the president;[4] —— who will clear the court on any discussion;—— and in case of intemperate words used by any member of the court, direct the same to be taken down in writing and reported to the officer ordering the court-martial to assemble;—— no reproachful words are to be used to witnesses or prisoners;—— and the president is hereby held responsible that every person attending such court be treated with proper respect;—— and in taking the votes of the court, the president shall begin by that of the youngest member.

[1] Chap. VI., par. 15. [2] Chap. VI. par. 39. [3] Sec. 15, Art. 17 of 1748.
[4] Chap. VI., pars. 13 and 60.

163. NO person who shall be acquitted or convicted of any offence shall be liable to be tried a second time by the same or any other court-martial for the same offence; —— and no finding, opinion, or sentence given by any court-martial, and signed by the president thereof, shall be revised more than once, nor shall any additional evidence in respect of any charge on which the prisoner then stands arraigned be received by the court on any revision.

PROVOST MARSHALS.[1]

164. FOR the prompt and instant repression of all irregularities and crimes abroad which may be committed by troops in the field and on the line of march, provost marshals shall be appointed by us, or by our commander of the forces, or general commanding, and their powers shall be regulated according to the established usages of war[2] and rules of our service, being limited to the punishment of offenders whom they may detect[3] in the actual commission of any crime; —— the general commanding our forces in the field will cause them to exercise the powers entrusted to them in such manner and under such circumstances as he may consider best calculated to prevent and instantly to repress crimes injurious to the discipline of our army and the public service; —— their duties are to take charge of prisoners confined for offences of a general description; —— to preserve good order and discipline; —— to prevent breaches of both by soldiers and followers of the army, and to punish on the spot,[4] or the same day, those whom they may find in the immediate act of committing breaches of good order and military discipline; —— provided that the punishment be limited to the necessity of the case, and shall accord with the orders which the provost may from time to time receive from our commander of the forces in the field, and that whatever may be the crime, the provost marshal or his assistants shall see[5] the offender commit the act for which summary punishment may be inflicted, or if the provost marshal or his assistants should not see the offender actually commit the crime, but that sufficient proof can be established of the offender's guilt, a report shall be made to the commander of our

[1] This Article was first inserted in the year 1829 (Chap. VIII., par. 12), so that Wellington carried on the discipline of the Peninsular Army upon his own authority as General-in-Command, and not with the express sanction of the Code. As to ordinary powers of the Provost, see Letters of 1809, Vol. II., p. 662.

[2] As to the Provost Establishment in the Peninsular, see these references in Desp., vol. iii., p. 488 and 767. Definition of Duties, see vol. v., pp. 347-704; vol. vii., p. 169. [3] Vol. iv., p. 311; and vol. vi., p. 518. [4] Vol. iii., p. 405.

[5] For inflicting punishment for a crime which the Provost-Marshal did not see committed, the Duke brought the Officer to Court-martial. 13 vol. Suppl. Desp., 685.

army in the field, who is hereby empowered to deal with the case as he may deem most conducive to the maintenance of good order and military discipline.

BOARDS AND COURTS OF INQUIRY.

165. FOR the purpose of securing a provision for life to the officers of our army who have sustained serious and permanent injury by wounds received in action with an enemy, according to our rules and regulations for granting pensions to wounded officers, —it is our will and pleasure, that when the state of the officer's wound shall be such as to require him to be inspected by a military medical board, convened by our order through our Secretary of State for War; —— such board shall be composed of not more than five nor less than three medical officers, and where three surgeons or medical officers of higher rank are not available, the board may be composed of one surgeon or medical officer of higher rank, and of two assistant surgeons of not less than six years service: —— the proceedings of the board in the inspection of wounded officers, and in certain cases of officers retiring on full or half pay, shall be conducted as follows: —— The senior medical officer shall act as president, and shall himself make, and require each member to make, the following declaration in presence of the officer whose case is under inquiry:—

I A.B. *do declare, upon my honour, that I will duly and impartially inquire into and give my opinion on the case of the officer now before this board, according to the true spirit and meaning of Her Majesty's orders and regulations, and the instructions issued by Her Majesty's orders on this head:—— AND I further declare, upon my honour, that I will not, on any account or at any time, disclose or discover my own vote or opinion, or that of any particular member of the board, unless required to do so by competent authority.*

THESE boards[1] will either have for their president, or report their proceedings to, the director general of the army medical department, who will transmit the report, for our decision, to our Commander-in-Chief or Secretary of State for War, as the case may require.

*166. IN order to secure to the deserving soldier, when discharged, a provision proportioned to the length and nature of his service, and to enable our commissioners of Chelsea Hospital to

[1] These Boards originated in 87 and 88 of the Arts. of War, 1830 (Chap. VIII., pars. 17 and 18). Each oath varies in its terms. The character of the Court-martial oath is preserved.

carry into full effect our rules and regulations for the pensioning of soldiers, — we do hereby order that when a soldier shall be discharged, whether for unfitness, or for any other cause, his services, conduct, character, and the cause of the discharge, shall be ascertained before a regimental board, to be held for the purpose of verifying and recording all these necessary particulars in the discharge, on which document the decision of our commissioners of Chelsea Hospital on the soldier's claim to pension will be made. —— The board shall be composed, in all cases, of *three* officers; —— the second in command shall be the president, and the two next senior officers on the spot shall be members; —— and all military persons who may be summoned by the president thereof, are directed to attend and give information to the board on the subject of their inquiry: —— Such board is not competent to award any punishment or forfeiture of service, their duty being restricted to the faithful and impartial record of the soldier's services and conduct at the close of his military career; —— and they will be governed in this their duty by a reference to our rules, orders, and regulations for the pensioning of soldiers, which regulations shall be produced before the board whenever it is assembled: —— When the board is assembled, the president and members thereof shall severally make the following declaration in the presence of the soldier whose case is under inquiry: ——

I A.B. *do declare, upon my honour, that I will duly and impartially inquire into the matters to be brought before this board, according to the rules and regulations of Her Majesty's service, and if any doubt shall arise, according to my conscience, the best of my understanding, and the custom of the service in like cases.*

167. [1] IF any soldier shall have been illegally absent from his duty for the space of *twenty-one days*, a court of inquiry of *three* officers shall forthwith assemble, who are hereby empowered to examine witnesses upon oath respecting the fact of such absence, and the deficiency, if any, in the articles of his kit; —— and, having received proof on oath of the facts, they shall declare such absence and the period thereof, and the deficiency, if any, in the articles of his kit; and the officer commanding the corps shall enter a record of such absence, and of such deficiency in his kit, and of the declaration of such court of inquiry thereon, in the regimental books; —— and if such soldier should not afterwards surrender or be apprehended, such record shall have the legal effect of a conviction for desertion; —— and if such soldier should surrender or be appre-

[1] Chap. IX., par. 21.

hended after such record shall have been so entered, such record, or a copy thereof, purporting to bear the signature of the officer having the custody of the regimental books, shall, on the trial of such soldier on a charge for desertion, or on charges of desertion, and losing or making away with articles of his kit, be admissible in evidence of the facts therein recorded; —— and on proof of the identity of the prisoner with the soldier therein mentioned, he may be found guilty of the charge or charges; —— and if he be convicted of desertion, the sentence of any such court shall be inserted in the soldier's discharge.

FORFEITURE OF PAY, SERVICE, MEDALS, ANNUITIES, GRATUITIES, PENSIONS, &c.

168. EVERY soldier found guilty by a court-martial of the following offences:—

Desertion:

Wilfully maiming or injuring[1] himself or any other soldier, whether at the instance of such other soldier or not, — or causing himself to be maimed or injured by any other person, —with intent thereby to render himself, or such other soldier, unfit for service:

Tampering with his eyes, with intent thereby to render himself unfit for service:

Such finding having been confirmed; ——

AND every soldier who may have been sentenced to penal servitude,—or who has been discharged with ignominy; ——

AND every soldier who has been found guilty of felony in any court of ordinary criminal jurisdiction in England or Ireland,—or of any crime or offence in any court of criminal judicature in any part of the United Kingdom, or in any dominion, territory, colony, settlement, or island belonging to or occupied by Her Majesty out of the United Kingdom, — which would, if committed in England, amount to felony; ——

SHALL thereupon forfeit all advantage as to good-conduct pay, and pension on discharge, which might have otherwise accrued from the length of his former service; ——

ALSO, all medals and decorations whatsoever which he may be

[1] These offences are not so rare as some are desirous of thinking. Within a few months, the case of a Militiaman who had cut off his trigger-finger to get out of the Militia without pay, 18*s.* 6*d.*, for his discharge came before me. And another where a Soldier was eating soap to induce disease in the lungs or heart to get from the Army.

in possession of and authorized to wear, together with the annuity or gratuity, if any, thereto appertaining.

169. ANY soldier who shall have forfeited the whole or any part of his service towards pay and pension, either upon conviction or sentence as aforesaid, or by sentence of a court-martial, or upon his trial for desertion being dispensed with, may, if he shall have subsequently performed good, faithful, or gallant services in our army, on the same being duly certified by our Commander-in-Chief, be eligible to be restored to the benefit of the whole or of any part of his service; —— and should the restoration be approved by us, our order for the same will be signified to our Commander-in-Chief through our Secretary of State for War.

170. NO soldier shall be entitled to pay or to reckon service towards pay or pension when in confinement under a sentence of any court, or during any absence from duty by commitment or confinement as a deserter by confession, or under any charge on which he shall be afterwards convicted, either by court-martial or by any court of ordinary criminal jurisdiction, or whilst in confinement for debt.

171.[1] NO soldier shall be entitled to pay, or to reckon service towards pay or pension, during the period of his absence as a prisoner of war; —— but upon rejoining our service due inquiry shall be made by a court-martial, and unless it shall be proved to the satisfaction of such court that the said soldier was taken prisoner through wilful neglect of duty on his part, or that he had served with, or under, or in some manner aided the enemy, or that he had not returned as soon as possible to our service, he may thereupon be recommended by such court to receive either the whole of such arrears of pay or a proportion thereof, and to reckon service during his absence.

172. ANY soldier who shall be convicted of desertion shall forfeit his pay and service for the day or days during which he was in a state of desertion, and any soldier *who enlisted, re-enlisted, or re-engaged subsequently to the passing of the Army Enlistment Act of* 1867, *or subsequently to its promulgation in general orders at a foreign station*, shall, if convicted, also forfeit his pay and service for the day or days of his absence exceeding five without leave.

173. ANY soldier who enlisted, re-enlisted, or re-engaged *subsequently to the passing of the Army Enlistment Act of* 1867, *or subsequently*

[1] This originated in 1815, men often being taken prisoners by intention or carelessness. See 55 Geo. III., c. 108, s. 125; and Art. 65, *ante*.

to its promulgation in general orders at a foreign station, and has been imprisoned by order of his commanding officer, shall forfeit his pay and service for any day or days during which he shall have been so imprisoned; —— subject, however, to the right of appeal given in such cases by these articles.

174. ANY soldier shall be liable,—at the discretion of his commanding officer, subject, however, to the right of appeal given in such cases by these articles,— to forfeit his pay for any day or days, not exceeding five, during which he shall have been absent without leave.

175. OUR Secretary of State for War may order or withhold the payment of the whole or of any part of the pay of any officer or soldier which by these articles has been rendered subject to forfeiture by reason of absence from duty for any of the causes aforesaid.

176. OUR Secretary of State for War may also withhold the pay of any officer or soldier for any period during which such officer or soldier shall be absent without leave, or improperly absent from his corps and from his duty.

177. OUR Secretary of State for War may also withhold a portion, not exceeding threepence for each day, of the daily pay of any soldier, if it shall appear to his satisfaction that such soldier has deserted his wife or any of his legitimate children under fourteen years of age, or left them in destitute circumstances without reasonable cause; —— and our Secretary of State may allot the pay thus withheld to the maintenance of such wife or children in such manner as he may think fit.

178. IN case of any doubt whatever as to the proper issue of pay, it may be withheld until our orders respecting it shall have been signified by our Secretary of State for War.

179. IF any soldier being on board ship commits any act of misconduct, his commanding officer may deprive him, for a period not exceeding twenty-eight days, of his ration of wine or spirits or malt liquor, or of his ration of sugar and tea, or any other substitute issuable to him in lieu of such ration of wine or spirits, or malt liquor, —— or may sentence such soldier, if he elect to take up neither his ration of wine or spirits or malt liquor, or his ration of sugar and tea, or any substitute issuable to him in lieu thereof, to forfeit one penny a day of his pay for a period not exceeding twenty-eight days.

SECTION IV.

RANK.

180.[1] ALL officers doing duty with their regiments only shall take rank according to the dates of their commissions in such regiments; —— but when serving together with officers of other corps, each shall take rank according to his brevet or date of any former commission.

181. WHEN our regiments of life guards and horse guards shall do duty together, the eldest officer by commission shall command the whole, regard being always had to the respective ranks of those corps, and the posts they usually occupy; —— and if any of our life guards, horse guards, or foot guards shall be serving with any of our other troops, the eldest officer by commission, without respect to the corps, shall take upon him the command of the whole.

182. WHENEVER our regiments of life guards, or detachments from the same, shall do duty together, unmixed with other corps, they are to be considered as one corps, and the officers are to take rank and do duty according to the dates of their commissions.

183.[1] AND when our regiments of foot guards, or detachments from our said regiments, shall do duty together, unmixed with other corps, they shall be considered as one corps, and the officers shall take rank and do duty according to the commissions by which they are mustered.

184.[2] THE officers in the late East India Company's service and in our Indian army shall take rank with the officers of our forces according to the dates of the commissions held by them respectively from us, or from authorities duly deputed by us.

185.[3] ALL colonels serving by commissions signed by us or by our general commanding in chief in North America, when employed in any duty in conjunction with general officers or colonels serving there by commissions from any of our civil authorities in the country, shall have precedence of such provincial officers, although their commissions be of elder date; —— and in like manner all officers, below the degree of colonel, having commissions signed by us, shall have precedence of such provincial officers of equal rank, though their commissions be of elder date.

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[1] These Articles were not in 1717, but they (I think) were first inserted in 1784, sec. 15.

[2] This was added in 1785 as two Arts. to sec. 23.

[3] Inserted in 1755, sec. 19, Art. 2, during the war in America.

186. OFFICERS of our regular forces, and also officers of our militia and fencible forces who take rank with officers of our regular forces as the youngest of their degree, shall have precedence of and command the officers of equal degree serving in our yeomanry, cavalry and volunteer corps; —— and the officers of our yeomanry, cavalry and volunteer corps shall rank together according to the dates of their respective commissions, except in cases where we may otherwise specially direct.[1]

SECTION V.

APPLICATION OF THE ARTICLES.

187. ALL the provisions of these articles shall apply to every person who is or shall be commissioned or in pay as an officer, or who is or shall be attested or in pay as a non-commissioned officer or soldier, and to all warrant officers, and to all persons employed on the recruiting service, receiving pay in respect of such service; —— and to persons who are or shall be hired to be employed in our royal artillery, royal engineers, and to master gunners, and to

[1] Inserted in 1798.

RELATIVE RANK.

1. *Army.*—The rank, or rule of precedence in the "Army," is governed by this Section of the Articles of War.

2. *Militia.*—The Relative Rank of the "Militia" towards the "Army," was fixed by the Militia Act of 1756, and continued in 1802 as "equal in degree," but junior in service; so that under the Militia Statute,* a Lieutenant-Colonel or a Field Officer of the Militia would command all the Majors or the Captains (as the case may be), of the Regular Army.

3. *Yeomanry.*—The Relative Rank of the Yeomanry is governed by 44 Geo. III., c. 54,† which placed these Officers as junior to the Officers of the Army and Militia, but with a restriction that no Yeomanry Officer shall ever rank above a Field Officer of either Service. A Yeomanry Major would, however, command all Captains of the other Forces.

4. *Volunteers.*—The Relative Rank of the Volunteer Officer, is as the youngest of their respective ranks; but he is prohibited from ever exercising‡ command over any other Forces other than as the Articles of War prescribe.

The effect of these legal enactments appears therefore to be:—

1. That the Majors and Captains of the Army may be commanded by the Lieutenant-Colonels and Majors of the Militia.

2. That the Captains and Lieutenants of the Army may also be commanded by the Majors and Captains of the Yeomanry.

And that this command is exercised (not by the Articles of War), but by the Statutes regulating the Militia and Yeomanry Forces.

* 42 Geo. III., c. 90, s. 2. † Sec. 26. ‡ Sec. 5 of 26 & 27 Vic. c. 65.

conductors of stores, and to the corps of royal military surveyors and draughtsmen, and to all officers and persons who are or shall be serving in the Control Department, and to officers and soldiers serving in the army hospital corps, or in the army service corps and to persons in the War Department, who are or shall be serving with any part of our forces, at home or abroad, under the command of any commissioned officer; —— and (subject to and in accordance with the provisions of statute of sixth and seventh Victoria, chapter ninety-five,) to any out-pensioners of the Royal Hospital, Chelsea, who may be called out on duty in aid of the civil power, or for muster of inspection, or who, having volunteered their services for that purpose, shall be kept on duty in any fort, town, or garrison; —— and to all civil officers who are or shall be employed by or act under our Secretary of State for War at any of our establishments in our islands of Jersey, Guernsey, Alderney, Sark, and Man, and the islands thereto belonging, or at foreign stations; —— and to all persons belonging to Her Majesty's Indian forces who are or shall be commissioned or in pay as officers, or who shall be listed or in pay as non-commissioned officers or soldiers, or who are or shall be serving or hired to be employed in the artillery or any of the trains of artillery, or as master gunners or gunners, or as conductors of stores, or who are or shall be serving in the department of engineers, or in the corps of sappers and miners or pioneers, or as military surveyors or draughtsmen, or in the ordnance or public works or commissariat departments; —— and to all storekeepers, and other civil officers employed under the ordnance: —— and to all veterinary surgeons, medical storekeepers, apothecaries, hospital stewards, and others serving in the medical department of the said forces; —— and to all licensed sutlers, and all followers in or of any of the said forces.

188. IN construing these articles, the word "regiment" may be deemed to include other branches of the service than those which are strictly regimental, and the provisions relating to regiments may be applied to such other branches; —— the words "Commander-in-Chief" shall be taken to include the field marshal or other officer commanding in chief our forces for the time being; the word "month" shall be taken to mean "lunar month," and the word "year" to mean "calendar year;" the word "district" shall in India be deemed to include a division, field force, or district directly subject to the command of the general commanding in chief the troops of the presidency; "one penny" shall in India be construed to mean "eight pies."

189. NO person subject to the Mutiny Act shall be sentenced to

suffer any punishment extending to life or limb, or to be kept in penal servitude, by virtue of these our Articles of War, except for such crimes as are expressly declared by the Mutiny Act to be so punishable.

190.[1] THE officers and soldiers of any troops, being mustered and in pay abroad, which are or shall be raised or serving in any of our dominions abroad, or in countries or places in possession of or occupied by our subjects or any of our forces; —— shall at all times, and in all places, when joined or acting in conjunction with our forces; —— or under the command of any officer having a commission immediately from us; —— be subject to these our Articles of War, and shall be liable to be tried by courts-martial, in like manner as our forces are.

191.[2] WHENEVER any of our forces shall be embarked on board

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[1] See Art. 185, *ante*, 26 & 27 Vic., c. 65, s. 5.

[2] This was put forth in 1795, as explained in Chap. V., pars. 45, 46.

Extract from Letter from H.R.H. The Duke of York to General Sir Ralph Abercrombie, dated 24th March, and included the Admiralty Order of the 28th March, 1795.

"It appearing at the same time to be highly expedient that the Troops should know how to conduct themselves in circumstances affecting their situation and discipline while on board such ships. I have it in command from His Majesty to give you the following instructions which you will impart to the Senior Officer of each Detachment of the Forces under your command, embarked on board ships of the description mentioned in the Article of War:—

"1st. In case any Officer, non-Commissioned Officer, or Soldier shall be guilty of any offence against the Laws and Regulations established for the Government and Discipline of the Ship in which he is embarked, the Commanding Officer of such Ship, by his own authority, and without reference to any other person, is to cause him to be put under arrest, or confine him a close prisoner if the circumstances of the case and the Naval Articles require it; and to detain him (if necessary) in either of these situations during his continuance on board, transmitting, without delay, a report in writing of the charges against such Officer, or Soldier, to his superior Officer, or to the Commander-in-Chief of the Land Forces, in order that he may be disembarked, or removed into some Transport the first convenient opportunity, and then proceeded against according to Military Law; if the offence charged be such as is cognizable by a General or Regimental Court-martial.

"2nd. In cases where the practice of the Navy authorizes immediate punishment, Private Soldiers (but no others) are to suffer such punishment as the Commanding Officer of the Ship may think fit to be inflicted, provided the Commanding Officer of the Troops shall previously concur in the necessity of such an immediate punishment. But if the latter differs in opinion thereupon (the reasons for which difference of opinion he shall state in writing, and deliver to the Commanding Officer of the Ship), the delinquents are to be disembarked or removed into a Transport, and to be proceeded against as stated in the preceding Article.

our ships of war or any other ships which may have been regularly commissioned by us, and which may be employed in the transport of our troops; ——our will and pleasure is, that the officers and soldiers of such forces, from the time of embarkation on board any ship as above described, shall strictly conform themselves to the laws and regulations established for the government and discipline of the said ship, and shall consider themselves, for these necessary purposes, under the command of the senior officer of the particular ship, as well as of the superior officer of the fleet (if any) to which such ship belongs.

192. THE second section of these our Articles of war is to be read and published *once* in every *three months* at the head of every corps in our service, together with the following articles in the other sections which are marked with an asterisk; viz.

4.	21.	118.	129.	135.	140.
5.	22.	119.	130.	136.	154.
8.	23.	126.	131.	137.	166.
13.	29.	127.	132.		

ALSO the following Notice:—

Under the existing law, any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in Her Majesty's forces by sea or land from his or their duty and allegiance to Her Majesty,—or to incite or stir up any such person or persons to commit any act of mutiny,— or to make or endeavour to make any mutinous assembly,—or to commit any traitorous or mutinous practice whatsoever, may on being legally convicted of such offence be sentenced to penal servitude for the term of the natural life of such person.

V. R.

"3rd. The Military Courts-martial, whether General or Regimental, cannot be held on board the said Ships consistently with the Laws of the Navy.

"4th. Should any Officer or Soldier, while embarked in such Ships, commit any Military offence for which he would be amenable to a Court-martial if serving on shore, requisition is to be made by his Commanding Officer to the Commanding Officer of the Ship, who will thereupon cause such Officer or Soldier to be put under arrest, or confinement, until he can be removed in the manner above mentioned, and brought to Trial.

"I am, &c.,
(Signed) "FREDERICK."*

* As to the controversy arising on this Order (for a copy of which I am indebted to Mr. Syms of the Adjutant-General's Office), see the Protest of the Admirals against it printed in vol. i. McAr., C. M., p. 408.

APPENDIX D.—CHAP. IV.

As Introductory to the subject of Courts-martial, an Extract from Section 16 (" *Duties in Garrison and Camp*") *will show how the duty of sitting in such a Court is assigned to an Officer.*

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I.—ROSTER OF DUTIES.

835. In all duties, whether with or without arms and whether performed by corps or by individual officers, the roster is to commence from the senior downwards.

836. Duties are thus classified:—

I. Guards, 1st, of the Sovereign; 2nd, of Members of the Royal Family; 3rd, of Viceroys; 4th, of the Captain-General, or Governor of a Colony; 5th, of the Commander-in-chief at home or abroad.

II. Divisional duties under arms.
III. Brigade or garrison duties under arms.
IV. Regimental duties under arms.

} Including orderly and piquet duty.

V. Courts-martial. 1st, general; 2nd, district or garrison; 3rd, regimental.

VI. Boards or courts of inquiry. 1st, divisional; 2nd, brigade; 3rd, regimental.

VII. Duties of fatigue.

837. When an officer's tour for more than one duty comes round on the same date, he is to be detailed for that duty only, which has the precedence in the classification in par. 836, and he is to receive an overslaugh for any other duties. When an officer is actually in the performance of one duty, and his tour for another duty occurs, he is not to make good that other duty, but his tour is to pass

him. An officer detailed as "in waiting" is not entitled to count a tour of duty.

838. Attendance at a court-martial, the members of which shall have been assembled and sworn, is to be reckoned a duty, though the court shall be dissolved without trying any person. At all times when a court-martial is not sitting, its members are, without further orders, to be considered available for parades or other duties that will not interfere with the performance of their court-martial duty; they are not however to quit the station without special authority, until the court shall have been dissolved. This rule is also applicable to courts of inquiry and boards.

APPENDIX E.—CHAP. IV.

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Section 14 *of Queen's Regulations* (1868) *relating to Courts-martial, Courts of Inquiry, and Boards.*[1]

I.—General Instructions.

732. The Mutiny Act and the Articles of War, copies of which are annually transmitted to each regiment and depôt by direction

[1] As my attention has been called by Lieut.-Colonel Vacher (of the Adjutant General's Department) to several General Orders altering these Regulations, I have printed the former as foot-notes.

of the Secretary-of State for War, lay down rules for the constitution of courts-martial, and define the powers with which they are invested, as well as the manner in which their proceedings are to be conducted. (See also Appendix, Nos. 4 and 5, for forms of proceedings, and charges, with instructions to the court.)

733. The duties devolving upon members of courts-martial are of the most grave and important nature, and in order to discharge them with justice and propriety it is incumbent upon all officers to apply themselves diligently to the acquirement of a competent knowledge of Military Law, and of the orders and regulations founded thereon, as also of the practice of Military Courts, with the view of making themselves acquainted with the nature and extent of the powers and authority vested in them by the Legislature, by the temperate and judicious exercise of which the discipline and character of the Army are to be maintained.

734. With this object in view, officers will be required on their entrance into the army to attend the proceedings of all courts-martial that may be held at the station where they are quartered for at least six months from the date of their joining. They are not however to be permitted to remain in court when it is cleared for deliberation, and are not to be nominated members of courts-martial until the commanding officer shall deem them perfectly competent to perform so important a duty. [See par. 838.]

735. All charges preferred against an officer or soldier, and the circumstances on which they are founded, are to be examined by superior authority, in order to ascertain that the case is a proper one for investigation by a court-martial, and that there is sufficient evidence to substantiate the charges.[1] It should be borne in mind that to prefer accusations which cannot be maintained is a practice highly inconvenient and injurious to the service.

736. General and other officers commanding on foreign stations are restricted from sending home officers or men, with articles of accusation against them and pending, except in cases of the most urgent and unavoidable necessity, as it is essential for the due administration of justice that when charges are preferred they should be thoroughly investigated on the spot, and without unnecessary delay. A commanding officer who, under any circumstances, not unavoidable, delays to bring forward charges, or permits charges to lie dormant, fails in a most essential duty to the service.

737. An officer who may be placed in arrest has no right to

[1] The prescribed form of application for Courts-martial on soldiers is W. O. Form, 733.

demand a court-martial upon himself, or to persist in considering himself under the restraint of such arrest, or to refuse to return to the exercise of his duty, after he shall have been released by proper authority. It by no means follows that an officer conceiving himself to have been wrongfully put in arrest, or otherwise aggrieved, is without remedy; a complaint is afterwards open to him, if preferred in a proper manner, and provision for that purpose is made in the Articles of War. An officer in close arrest is not allowed to leave his quarters or tent. If he be in arrest at large, he may be permitted by superior authority to take exercise within defined limits, viz., not beyond the barracks, or if in camp, not beyond the quarter guard, and then only at stated periods; but he is not at liberty to dine at his own or any other mess, nor is he to appear at any place of amusement or public resort, and he is on no pretext to quit his room, or tent, dressed otherwise than in uniform, but without his sash and sword.

738. Whenever general officers, or colonels, are available as presidents of general courts-martial no officer of inferior rank is to be placed on that duty.

739. Whenever it can be arranged without serious inconvenience to the service, the members of a court-martial assembled for the trial of an officer are to be of equal, if not superior, rank to the prisoner; and in no case but one of necessity is a colonel to sit upon the trial of a general officer, or a captain on that of a field officer, or a subaltern officer on that of a captain. On the trial of subaltern officers, two officers of that rank are considered a sufficient proportion to be detailed as members of the court. The members of a court may however be of any rank superior to that of the prisoner.

740. When the commanding officer of a corps is brought to trial, care is to be taken that as many members of the court as possible shall be officers who have themselves held, or who are holding commands equivalent to that held by the prisoner.

741. Any number of prisoners may be tried together for an offence committed collectively, but when more prisoners than one are tried by the same court-martial, and they are arraigned upon separate and distinct charges, the court is to be re-sworn at the commencement of each trial, and the proceedings of each trial are to be conducted and recorded separately.

742. All official books and orders having reference to courts-martial are to be laid before every court when sitting.

743. It is important that every trial by court-martial once begun should, as far as possible, proceed with strict regularity, and without interruption, to its conclusion. The court have the power of

granting an adjournment, but they should in no case permit an adjournment for the purpose of obtaining further evidence, either on behalf of the prosecution or of the prisoner, unless they are satisfied that such adjournment and production of further evidence will not render the trial unjust, and ought reasonably to be allowed in order to assist the course of justice. Great care is therefore to be taken, both by the prosecuting officer and the prisoner, to have ready at the trial all the witnesses and documents which they may desire to produce in support of their respective cases.

744. On general courts-martial it is the duty of the officiating Judge Advocate to furnish the accused within a reasonable time before the trial with a copy of the charge to be preferred against him. In the case of trial by inferior courts, this duty will devolve on the Adjutant. To a soldier who cannot read, the charge is to be read, and, if necessary, explained by the person who warns him for trial.

745. In framing charges, care is to be taken to render them specific, in names, dates, and places. In charges against non-commissioned officers or soldiers, the prisoner's regimental number is to be inserted, but all non-essential minutiæ are to be avoided. Where a prisoner is charged with any loss or damage, the amount of such loss or damage (except with respect to arms, clothing, or other articles, the prices of which are fixed by regulation) is to be specified in the charge, and the prisoner is to be sentenced to be put under stoppages for such amount only as may be proved in evidence.

746. A charge of "disgraceful conduct" is never to be preferred against a soldier unless the offence is clearly one of those specified in the Articles of War as constituting disgraceful conduct, or is obviously of a felonious or fraudulent nature, or of a cruel, indecent, or unnatural kind.

747.[1] A private soldier is not to be brought to trial by court-martial on a charge of simple drunkenness only. If, however, he is

[1] 1869. G. O. 62.—DISCIPLINE. (*Specially issued 26th May*, 1869.)

With reference to par. 747 of the Queen's Regulations and Orders for the Army, the attention of general and commanding officers is particularly called to the 78th Article of War, which prohibits the trial of private soldiers by regimental courts-martial, for drunkenness not on duty. If therefore a soldier commits that offence, in combination with some other crime for which it is intended to bring him to trial before a regimental court-martial, the act of drunkenness is not to be added to the charge on which he is to be arraigned; but, as it is necessary that the drunkenness should be recorded, in order to compute the fines which may have to be subsequently levied, commanding officers should award punishment for that offence before the prisoner is brought to trial on the other charge.

to be tried for another offence, a charge of simple drunkenness may be added as a separate charge. In cases of habitual drunkenness the evidence given from the defaulter book is to specify the date, place, and circumstance of each previous instance of drunkenness. The entries in the defaulter book are to be conclusive evidence of the previous instances of drunkenness therein stated.

748. In every case in which a prisoner pleads guilty, the court is, notwithstanding, to receive, and to report in the proceedings, such evidence as may afford a full knowledge of the circumstances, as it is essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect.

749. When a soldier, who is not serving in the command, is required as a witness before a court-martial, the officer in command of the district, on the representation of the commanding officer, is to apply to the Adjutant General for the attendance of such soldier, naming the day of the assembly of the court.

750. Military (or civil) witnesses refusing to be sworn cannot be brought to trial if such refusal is grounded on conscientious motives. The Act 24 and 25 Vict., c. 66 enacts in such a case that the president is qualified to receive the witness's solemn affirmation, which may be given in the following form:—

"*I, A. B., do solemnly, sincerely, and truly affirm and declare that* "*the taking of any oath is, according to my religious belief, unlawful;* "*and I do also solemnly, sincerely, and truly affirm and declare that I* "*will speak the truth in the matter now under investigation.*"

751. After a soldier has been found guilty of the charge or charges preferred against him, the court is to inquire into and record the prisoner's former convictions (if any), and any sentence which he may be undergoing; also his age, date of attestation, service allowed to reckon towards limited engagement, his general character, and any decorations or other honorary rewards he may be in possession of. These particulars are required for the guidance of the court in awarding punishment, as well as for that of the confirming authority in sanctioning the award. The evidence under this head is to be given whenever possible by a commissioned officer who is not a member of the court.

752. The minutes of the proceedings of all courts-martial are to be fairly and accurately recorded, in a clear and legible hand, without erasures. (See Appendix No. 4.) When interlineations, which should be avoided as much as possible, are necessarily made, they are to be verified by the president's initials. The pages are to be numbered, and the sheets, when more than one, are to be fastened

together. Care is to be taken that sufficient space, at least half a page, is left, immediately below the signature of the president, for the signature and remarks of the confirming authority.

753. A certificate, showing the state of health of the prisoner on the day of trial, and whether he has or has not been marked with the letters D. or B.C., is to be laid before the court and attached to the proceedings. The certificate is to be in the handwriting of a medical officer, according to the following form:—

"*I certify that No.* , *A.B. of the* *Regiment is* [*or is* "*not*] *in a good state of health, and fit* [*or unfit*] *to undergo* [1] *imprison-*"*ment, solitary or otherwise, and with or without hard labour; and that* "*his present appearance and previous medical history both justify the* "*belief that hard labour employment will neither be likely to originate* "*nor to reproduce disease of any description. The prisoner is* [*or is* "*not*] *marked with the letters D. or B.C.*"

The certificate is to be renewed in the event of any change taking place in the state of health of the prisoner during the sitting of the court.

II.—Sentences.

754. Courts-martial, before passing sentence, are to ascertain that the state of health of the prisoner, as shown by the medical certificate, will admit of the sentence being forthwith carried into effect. If the certificate states that the prisoner is unable to undergo hard labour, the court may nevertheless award "*imprisonment with such labour as in the opinion of the medical officer of the prison the prisoner may be equal to.*"

756. The sentence should conform to the wording of any section of the Mutiny Act, or of any Article of War, that may be applicable, without quoting it. Sentences of imprisonment are always to be specified in days.

757. In passing sentences of mixed imprisonment, courts-martial should leave it to the discretion of the governor of the prison to appoint the precise period or periods of the imprisonment during which the offender shall undergo solitary confinement. They will, however, in wording their sentence carefully comply with the directions contained in the Articles of War respecting the length of the periods of solitary confinement, and the intervals between such periods. (See Appendix, No. 4, Sentences.)

758. When courts-martial avail themselves of the power vested in them by the Mutiny Act regarding the imprisonment of offenders already under sentence for previous offences, they should be careful

[1] 1870, G. O. 100. "Corporal punishment" is only to be inserted on service in the field.

to adhere to the provisions of the said Act, by awarding in express terms that "*the imprisonment is to commence at the expiration of the "punishment to which the prisoner had been previously sentenced.*"

759. Whenever a court-martial is re-assembled for the purpose of revising their proceedings, the letter, order, or memorandum, or a copy thereof, containing the instructions to the court, and the reasons for requiring the revision, is to be attached to, and form part of, the proceedings.

760. Just discrimination is to be used by the court in applying the quantum of punishment to the nature and degree of the offence, so that the award may be final, and carried into effect; as it is indisputable that crimes are more effectually prevented by the certainty than by the severity of punishment.

761. When a non-commissioned officer is sentenced to be reduced, it must be distinctly stated in the sentence that he is to be "reduced to the ranks" (*i.e.*, to a gunner, driver, sapper, or private). The sentence of reduction of artificers, having the rank of a non-commissioned officer, is to be awarded in the same terms, *i.e.*, "to the ranks," and not to shoeing smiths, &c.

762. Whenever it becomes necessary to bring an acting bombardier or lance corporal to trial by court-martial, he is to be arraigned as a gunner, driver, sapper, or private, as the case may be. The direction to cease to do duty as an acting bombardier or lance corporal is to form no part of the sentence of the court.

763. It is forbidden to reprimand a non-commissioned officer by sentence of court-martial, such a sentence being applicable only to commissioned officers.

764. The duration of imprisonment for all ordinary offences is not to exceed six months, but for offences of a more aggravated character, imprisonment may, under the provisions of the Articles of War, be awarded by court-martial to the extent of, but not exceeding, two years. In awarding sentences of imprisonment, the locality and climate in which the offender has to suffer is, however, to be kept in view. It is also the province of the general officer confirming the sentence to take these circumstances into consideration, with a view to diminish the period of imprisonment, if necessary.

765. There are few crimes committed by soldiers which cannot effectually be dealt with by district courts-martial, the powers given to which are ample for the maintenance of discipline among the non-commissioned officers and privates. The higher tribunal of a general court-martial is not to be resorted to, except in aggravated cases deserving the more severe punishment of death or penal servitude.

766. In the case of district courts-martial, the commanding officer of a regiment may, if he should see reason, recommend to the general officer who confirmed the sentence a partial remission of the punishment. In the case of regimental courts-martial he has the power under the provisions of the Articles of War of confirming, remitting, or mitigating the sentence at his own discretion, but he cannot *commute* it except in the case of corporal punishment.

III.—Transmission of Proceedings.

767. If the trial takes place at home, the proceedings of a general court-martial are to be transmitted by the officiating judge advocate to the Judge Advocate General, for the decision of the Sovereign; if abroad, to the General in command or other officer vested with authority to confirm the sentence.

768. The proceedings of all district or garrison courts-martial are to be forwarded by the president to the General officer commanding (or to the Adjutant-General, where there is no general officer in command) for confirmation. The determination of the confirming officer, and the manner in which each case is disposed of, are to be stated by him at the end of the proceedings.

769. When the proceedings of district courts-martial abroad have been confirmed and promulgated, they are to be forwarded by the president to the Judge Advocate General. On home service the proceedings are to be sent by the president under cover to the deputy judge advocate of the district, who will submit them to the Judge Advocate General, at the same time drawing his immediate attention to anything requiring notice in the proceedings.

770. All proceedings of courts-martial transmitted to the Judge Advocate General, whether before or after promulgation, are to be accompanied by a covering letter specifying the nature of the contents.

IV.—Duties of Deputy Judge Advocates.

771. The following instructions defining the powers and duties of the Deputy Judge Advocates of districts at home are to be strictly adhered to:—

a. The deputy judge advocate at a general court-martial will maintain an entirely impartial position, and act as assessor to the court.

b. He will give his advice on all matters of law, evidence, or procedure; and, whether consulted or not, will interfere to ensure the due formality and legality of the proceedings.

c. At the conclusion of the case, he will sum up the evidence and

give his opinion upon the legal bearing of the case, before the court proceeds to deliberate upon its finding.

d. The opinion of the deputy judge advocate ought to be conclusive upon any point of law or procedure which arises upon a trial at which he officially attends, whether he has or has not an opportunity of consulting the Judge Advocate General before a decision is made.

e. He will be responsible to the Judge Advocate General for a proper record of the proceedings. In important cases he should be assisted in the discharge of this duty by a sworn short hand writer.

f. In all cases where a prisoner is undefended, the deputy judge advocate is to take care that the prisoner does not lose any privilege that the law allows him in the conduct of the trial.

g. The seat and table of the deputy judge advocate are to be at the right of the president of the court.

h. He will take no part in the conduct of the prosecution, and in all other respects will fulfil the duties of a deputy judge advocate.

772. With a view to regulate and render uniform the procedure of general courts-martial, in respect to addresses to the Court from the officer conducting the prosecution and from the prisoner, the following instructions are also to be observed:—

a. The officer conducting the prosecution is to be allowed an opening address. At the close of the evidence for the prosecution, the deputy judge advocate will ask the prisoner if he intends to adduce evidence. If the prisoner then replies in the negative, the prosecutor will proceed to address the Court a second time, for the purpose of summing up his evidence, after which the prisoner may address the Court in his defence. At the conclusion of his address, the deputy judge advocate will, in open court, sum up the case to the Court.

b. If, in answer to the deputy judge advocate, the prisoner states that he intends to adduce evidence, he may open his case with an address, before calling his witnesses. At the conclusion of the evidence he may again address the Court, after which the prosecutor will be entitled to a reply.

c. In those special cases where evidence is allowed in reply, the second address of the prisoner is to be made after such evidence, and immediately before the prosecutor's reply.

d. The address in open court of the deputy judge advocate, summing up the whole case, is to follow the prosecutor's reply.

e. After the deputy judge advocate has spoken, no other address is to be allowed, and the Court will retire to consider its finding.

f. If any question should arise incidentally during the trial, such as upon the admissibility of evidence, the person, whether prosecutor or prisoner, requesting the opinion of the Court, is to speak first: the other person is then to answer, and the first person is to be allowed to reply.

V.—Disposal of Court-Martial Prisoners.

773. Prisoners intended for discharge on the termination of their imprisonment are to be sent to civil and not military prisons. Offenders sentenced to penal servitude are to be disposed of under instructions from the Secretary of State for War, who will make known the convict prison to which they are to be committed. These instructions will usually be conveyed on home service through the medium of a "Route" issued by the Quarter-Master-General, in which will be specified the prison to which the offender is to be conveyed. The forms to be gone through when a soldier is sentenced to be discharged with ignominy are detailed in par. 1448.

774. When soldiers are committed to civil gaols[1] they are to be sent so as to arrive at the prison before 10 o'clock p.m. When a prisoner is unavoidably detained beyond that hour, he is to be placed in custody of a military guard for the night, and handed over to the gaoler early on the following morning. Prisoners sent under escort to military prisons are not to arrive *later than six* o'clock p.m. Their release therefrom is to be carried out in accordance with the "Regulations for Military Prisons."

775. The commitment to civil or military prison, in pursuance of the sentence of a court-martial, is to be carried out in accordance with the instructions on the prescribed form (W. O. Form 219), which is to be carefully filled up on all occasions, more particularly with reference to the medical certificate, as serious inconvenience is occasioned by sending either to a military or civil prison offenders who are not in a fit state of health to undergo prison discipline.

776. Medical officers in framing this certificate on the form of commitment are to state the grounds on which they have based their opinion, whenever they consider the offender unfit for the ordinary hard labour of the prison. In calculating sentences of imprisonment the day on which the proceedings of the courts-martial shall have been signed by the president, and the date of release of the prisoner, are to be included.

779. Corporal punishment is to be inflicted in the presence of a

[1] All military prisoners passing through, and detained in, London under escort should be lodged for safe custody at night, in the Middlesex House of Detention at Clerkenwell. Those under sentence for long imprisonment in England will be sent to Millbank.—G. O. 27, 1870.

medical officer, whose duty it will be to ascertain that the prisoner is in every respect capable of bearing the punishment. Such sentences are not to be carried into effect on Sundays, except in cases of absolute necessity.

780. The infliction of corporal punishment a second time under one and the same sentence is illegal. The prisoner is therefore to be considered as having expiated his offence when he shall have undergone, at one time, as much of the corporal punishment to which he has been sentenced as, in the opinion of the medical officer in attendance, he may have been able to bear.

781. When a soldier has been tried and sentenced by court-martial, and his punishment has been wholly remitted, there is to be no remission of any penalty consequent on his conviction, such as forfeiture of service, good-conduct pay, &c., &c.; but when the proceedings of a court are *quashed* on account of their illegality, or from any other circumstances, the soldier is to be relieved from all consequences of his trial, and all record of it is to be erased.

782. A soldier who has forfeited his claim to reckon service towards good-conduct pay and pension, will be eligible to be recommended for the restoration of such service when he establishes his claim thereto by an undeviating course of good conduct for five years in case of a first conviction entailing loss of service, for seven years in case of a second conviction of the same nature, or for ten years should any circumstance of an aggravated character have attended the commission of the offence on account of which he had incurred the penalties in question. Fraudulent enlistment while belonging to the Militia will be considered as a conviction, for this purpose only, although the man may not have been tried for the offence. A soldier may, however, be recommended for such restoration within half the periods here prescribed, provided he has shown not only unremitting good conduct, but has also given good, faithful, or gallant service of a constant and sustained character in the field, or has performed some specific act of valour in the field, reflecting honour on the regiment, and on himself.

783. The period of probation will, except in the case of fraudulent enlistment from the militia, be reckoned from the release of the soldier from imprisonment, and his return to duty. In cases of fraudulent enlistment from the militia, the period of probation will reckon from the date of attestation for the line. Commanding officers will forward, on the 1st January and 1st July of each year, returns, on W. O. Form 435, or 495, as the case may be, of all men under their command who during the half-year previous to those dates have become eligible for restoration of forfeited service, noting opposite each man's name the exact date of his so becoming

eligible. These returns are to be addressed to the Adjutant-General, and to be accompanied in each case by a certified copy of the record of the soldier's service. (*See* G. O. 47 of 1872.)

VI.—Crimes cognizable by the Civil Power.

784. The following Instructions, which were issued by the Secretary of State for War on the 26th January, 1863, for the guidance of Commanding Officers and others, are republished for general information:—

a. "All crime punishable by the civil power,[1] the commission of which is brought to the cognizance of the Commanding Officer, should forthwith be notified by the Commanding Officer to the chief constable of the county or borough, that the same may be duly investigated by the police and punished by the ordinary criminal tribunals of the county or borough."

b. "In cases of murder, where the accused and the deceased were *both* subject to the Mutiny Act, the Commanding Officer should request the magistrates forthwith to transmit a copy of depositions taken before them to the Secretary of State, that the case may (if he deems it expedient that a more speedy trial of the accused should be had than the usual course of practice allows) be prepared for trial by the solicitor to the Department under the jurisdiction in 'Homicides Act, 1862.'"

c. "Where Commanding Officers or the men under their command are made defendants in legal proceedings, whether of a civil or criminal nature, the defence thereof must be conducted upon the sole responsibility of such defendants.

d. "When in such cases any claim is preferred to the Secretary of State for assistance in the defence or for the reimbursement in the cost thereof, it must clearly be shown with reference to the declaration or indictment (of which a copy

[1] When a soldier is sentenced to imprisonment by the civil power for an offence of a disgraceful or felonious nature, a full report of the case, accompanied by a copy of the conviction,—showing the prison to which the man may be committed,—together with extracts from the Court-martial and defaulter books, and a descriptive return on W. O. Form 432, is to be transmitted to the Adjutant General, through the General or other officer commanding the district or station,—who will make such observations as he may think it necessary to furnish.

C. O.'s in complying with these instructions will state whether in their opinion the soldier has committed the offence with a view to his obtaining his release from the army, and whether they recommend that he should be discharged or retained in the service, with their reasons for such recommendation.

1871. G. O. 17 and 85.—Civil Convictions.

should be sent with the application) that the act complained of was one sanctioned by competent authority or clearly within the prescribed course of the defendant's duty."

e. "Until the Secretary of State directs the solicitor to the Department to take charge of the defence or to reimburse the cost, he will incur no responsibility whatever on account thereof."

VII.—Courts of Inquiry and Boards.

785. A Court of Inquiry may be assembled by any officer in command, to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view, such Court may be directed to investigate and report upon any matters that may be brought before it; but it has no power (except when convened to record the illegal absence of soldiers, as provided for in the Articles of War) to administer an oath, nor to compel the attendance of witnesses not military.[1]

786. A Court of Inquiry is not to be considered in any light as a judicial body. It may be employed, at the discretion of the convening officer, to collect and record information only; or it may be required to give an opinion also on any proposed question, as to the origin or cause of certain existing facts or circumstances. Specific instructions on these points are however always to be given to the Court. The proceedings are to be recorded in writing, as far as practicable in the form prescribed for courts-martial, signed by each member, and forwarded to the convening authority by the president.

787. A Court of Inquiry may consist of any number of members (not including medical officers), but the composition of such Courts must be regulated, at the discretion of the convening officer,

[1] 1869. G. O. 60.—Discipline. (*Specially issued 14th May*, 1869.)

The attention of general and commanding officers is called to the 167th Article of War, which empowers Courts of Inquiry, assembled to record the absence without leave of soldiers, to take evidence upon oath respecting the deficiency of any articles of the absentee's kit, as well as to the fact of the man's absence. The declaration of such courts is to be entered in the Regimental Court-martial Book, and that record, or a copy thereof, purporting to bear the signature of the officer having the custody of the regimental books, shall be admissible in evidence of the facts on the trial of the soldier. The original proceedings are to be destroyed.*

When a regiment embarks for foreign service, copies of such records referring to all men still absent, verified by the officer having custody of the regimental books, are to be left with the depôt.

* G. O. 24, 1872.

by the circumstances under which they are assembled. Three members, the senior acting as president, will in ordinary cases be found sufficient.

Boards.

788. Medical Officers are exempted from serving as members of any Boards, except medical Boards. Should a medical opinion be required by a military board, reference is to be made to the medical officer detailed to attend it, who will furnish his report in writing, or give evidence in person if thought necessary.[1]

APPENDIX (No. 4) F.—CHAP. IV.

(*Referred to in par.* 732).

FORM OF RECORDING THE PROCEEDINGS OF A GENERAL COURT-MARTIAL, including some of the more unusual incidents which may occur to vary the ordinary course of procedure, with instructions for the guidance of the Court.[2]

PROCEEDINGS of a GENERAL COURT-MARTIAL, held at
on the day of 18 , by order of
Commanding , dated the
day of , 18 .

PRESIDENT.

MEMBERS.

Rank.	*Name.*	*Regiment.*

, Deputy Judge Advocate.

At o'clock the Court opens.

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[1] All proceedings of boards, committees, or courts of inquiry, for which special printed forms do not exist, are to be written on W. O. Form 263, which has been introduced for general use.—G. O. 87, 1868.

[2] N.B.—With obvious alterations and omissions, this form is applicable to District or Regimental Courts-martial. For General and District Courts-martial, W. O. Form 642, to be obtained from General Officers commanding, is to be used in accordance with these instructions.

The proceedings of Regimental Courts-martial should be written on the paper, which is issued by the War Office as the authorised form of Court-martial Book, viz., W. O. Book 89.

First day. [*No.—Rank—Name—Regiment*] is brought a prisoner before the Court.

The order for convening the Court, and the warrants appointing the President and Deputy [*or*, Officiating] Judge Advocate are read.

The names of the President and Members of the Court are read over in the hearing of the prisoner, and they severally answer to their names.

Do you object to be tried by me as the President or by any of the officers whose names you have heard read over?

Question by the President to the Prisoner. Answer. [Instruction.—*The Questions are to be numbered throughout consecutively in a single series. The letters Q. and A. in the margin may stand for "Question" and "Answer" respectively.*]

VARIATIONS.

CHALLENGING PRESIDENT.

Answer.—I object to

Question to the Prisoner.—State your objection.

Prisoner.—

The prisoner in support of his objection requests permission to call

is called into Court, and is questioned by the prisoner.

The Court is cleared.

Decision.—The Court, by a majority of two-thirds, disallow the objection. *Or,*

The Court suspend their proceedings, and refer the prisoner's objection to the convening officer.

At o'clock the Court resume their proceedings, and a letter (&c.) is read to the prisoner, marked and attached to the proceedings.

N.B.—*The Judge Advocate cannot be objected to by the prisoner.*

CHALLENGING MEMBER.

Answer.—I object to

Question to the Prisoner.—State your objection to

Prisoner.—

The prisoner, in support of his objection to requests permission to call , &c. &c.

The Court is cleared.

Decision.—The Court disallow the objection.

The Court is reopened, and the above decision is read to the prisoner.

Decision.—The Court allow the objection.

The President informs that he is not required to serve on this Court-martial.

The Court is re-opened and the above decision is made known to the prisoner.

New Member.—(*Rank—Name Regiment*) takes his place as a member of the Court.

Question to Prisoner.—Do you object to be tried by as a member of this Court-martial?

Answer.—

(*Any objection is dealt with as in the case of an original member.*)

The President, Members, and Judge Advocate are duly sworn.

The Prisoner [*No.—Rank—Name—Regiment*] is arraigned upon the following

CHARGE.

Charge.

Are you guilty or not guilty of the charge against you, which you have heard read? Question to the prisoner.

Answer.

[Instructions.—1. *It is generally advisable that the witnesses be ordered out of Court at this stage of the proceedings.*

2. *All proceedings of the Court, except when it is cleared for deliberation, are to take place in presence of the prisoner.*

3. *No Court-martial should proceed to trial until they have satisfied themselves of their competence to deal with the charge, both as respects their jurisdiction and the precision with which the charge is worded.*]

VARIATIONS.

1. The prisoner not pleading [refusing to plead] to the above charge, the Court enter a plea of "not guilty."

2. *Plea.*—The prisoner pleads (in bar of trial).

The Court disallow the plea in bar of trial, and require the prisoner to plead to the charge.

Question to the Prisoner.—Have you any evidence to produce in support of your plea?

Answer.—

(*Witness examined on oath.*)

The Court are of opinion that the prisoner has not [has] substantiated his plea, and in consequence proceed with the trial [do therefore adjourn until further orders].

(*Rank—Name—Regiment*) appears as Prosecutor, and reads the following address, which is marked , signed by the President, and attached to the proceedings. Prosecution.

[Instructions.—*If possible, no officer who is to be called as a witness is to be appointed to act as prosecutor. When the prosecutor is required to give evidence he must be sworn.*]

The Prosecutor proceeds to call witnesses.

(*Rank—Name—Regiment*) being duly sworn is examined by the Prosecutor. First witness for prosecution.

Q.

A.

Cross-examined by the Prisoner.

[Instruction.—*Although a prisoner may have a professional adviser near him during the trial, to advise him on all points, and to suggest, in*

writing, the questions to be put to witnesses, such adviser is not to be permitted to address the Court or to examine witnesses orally.]

Q.
A.

Re-examined by the Prosecutor.

Q.
A.

Examined by the Court.

Q.
A.

The witness withdraws.

[Instruction.—*It is usual to read the whole of a witness's deposition to him before he quits the Court, in order that he may correct any accidental mistake or omission in the recorded minutes. The Court may put questions to witnesses at any stage, but it is preferable to defer them until the examination of the witnesses by the parties to the trial has been concluded.*]

VARIATION.

The prisoner declines cross-examining this witness.

[Instruction.—*In every case where the prisoner does not cross-examine a witness for the prosecution this statement is to be made, in order that it may appear on the face of the proceedings that he has had the opportunity given him of cross-examination.*]

Second witness for prosecution. being duly sworn, is examined by the Prosecutor.

(*The examination, &c., proceeds as above.*)

[Instruction.—*There is to be a blank line between the recorded minutes of every two witnesses.*]

At o'clock the Court adjourn until o'clock on the

Second day. On , the of 18 , at o'clock, the Court re-assemble, pursuant to adjournment, present the same members as on

VARIATIONS.

(*Rank—Name—Regiment*) being absent. (*The absence is accounted for.*) — Absent Member.

The Judge Advocate produces a medical certificate, which is read, marked , and attached to the proceedings.

The Court adjourn until .

The Court being below the number required by the Mutiny Act, adjourn until further orders; or,

There being present (*not less than the least number required by the Mutiny Act*) members, the trial is proceeded with.

A warrant is read, bearing date , appointing (*the senior member*) president of the Court-martial in the place of who — New President.

The trial is proceeded with.

A warrant is read, bearing date , appointing to act as Judge Advocate in the place of , who is duly sworn. — New Judge Advocate.

The trial is proceeded with.

[Instruction.—*No proceedings can take place in the absence of either President or Judge Advocate.*]

Examination [cross-examination] of continued.

Q.

A.

The prosecution is closed.

Do you intend to call any witness in your defence? — Question by the Court to the prisoner.

A. Yes.

[Instruction.—*If the prisoner replies in the negative, the course prescribed in par. 772a of the text will be pursued.*]

DEFENCE.

The prisoner having been called upon to make his defence says: [*or* requests to be allowed days to prepare his defence.] — Defence.

[Instruction—*If a prisoner's defence be verbal, it should be taken down as nearly as possible in his own words, and in the first person.*]

The prisoner calls the following witnesses.

(*Rank—Name—Regiment*) is duly sworn. — First witness for defence.

Examined by the prisoner.

Q.

A.

Cross-examined by the Prosecutor.

Q.

A.

Re-examined by the Prisoner.

Q.
A.

Examined by the Court.

Q.
A.

The witness withdraws.

Close of the defence. The prisoner reads an address, which is marked , signed by the President, and attached to the proceedings.

[Instruction.—*If necessary the Court may now be adjourned to enable the prosecutor to prepare his reply; the fact of adjournment being recorded as before.*]

Reply. The prosecutor reads the reply, marked , which is signed by the President, and annexed to the proceedings.

[*Or* the prosecutor declines making a reply.]

The Court adjourn until , to enable the Deputy Judge Advocate to prepare his summing up.

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th day Summing up. The Court re-assemble on , and the prisoner being present the Deputy Judge Advocate reads the summing up, which is marked , signed by the President, and attached to the proceedings.

The Court is cleared for the purpose of considering the Finding.

FINDING.

Finding. The Court find that the Prisoner (No.—*Rank—Name—Regiment*)

Not guilty. is not guilty of the charge;

OR,

Guilty. is guilty of the charge [all the charges].

OR,

is guilty of the first charge and guilty of the second charge with the exception of .

OR,

is not guilty of desertion, but is guilty of absence without leave.

[Instruction.—*In all cases when the Court acquit the Prisoner, the Finding is to be recorded in simple terms "Not Guilty." If on the trial of a commissioned officer they desire to acquit the Prisoner honourably, they are to state so in a separate letter.*]

PROCEEDINGS BEFORE SENTENCE.

The Court being re-opened, the Prisoner is again brought before it.

(*Rank—Name—Regiment*) is duly sworn.

What record have you to produce in proof of former convictions against the prisoner? Question by the President.

I produce a verified extract from [*or* There are none]. Answer.

[*See form at the end of this Appendix.*]

This document being read, compared with the original, and found correct, is marked "; signed by the President, and attached to the proceedings.

[*Courts-martial in recording former instances of drunkenness, in accordance with the 78th Article of War, will enter in their proceedings the number of such instances as proved by reference to the defaulters' books. The evidence on this head is to be given by the officer whose duty it is to prove former convictions, and in the following terms:*— (G. O. 60, 1869).

"*On reference to the* [*regimental, troop, battery, or company*] *defaulters' book now laid before the court, it appears that the prisoner's name has been recorded therein for the crime of drunkenness times since his enlistment.*"]

Is the prisoner under any sentence at the present time? *Q.*
A.

What is the prisoner's general character? *Q.*
A.

What is his age? *Q.*
A.

What is the date of his attestation? *Q.*
A.

What service is he allowed to reckon towards discharge? *Q.*
A.

Is the prisoner in possession of any decorations or honorary rewards? *Q.*
A.

[Instruction.—*In a case of desertion it is to be asked and recorded whether the prisoner surrendered or was apprehended.*]

The Court is again cleared.

SENTENCE.

The Court sentence the prisoner (*No.* —, *Rank* —, *Name* —, *Regiment* —.) Sentence.

[Instruction.—*The sentence is to be marginally noted in every case.*] (G. O. 72, 1869).

a. To suffer death by being shot [hanged]. Death.

Penal servitude years.

b. To suffer penal servitude for the term of years [*or* for life].

Cashiered.

c. To be cashiered.

Fined.

d. To be fined *s.* *d.*

Reduction.

e. To be reduced to the ranks.

[Instruction.—*This implies reduction of a non-commissioned officer to gunner, driver, sapper, or private, as the case may be.* See par. 761.]

Impt. H.L. for days.

f. To be imprisoned with hard labour [with such labour as, in the opinion of the medical officer of the prison, he may be equal to] for days.

84 days Impt. H. L. and S. C.

g. To be imprisoned for eighty-four days, forty-two of the said eighty-four days to be solitary confinement, such solitary confinement not to exceed fourteen days at a time with intervals between the periods of solitary confinement of not less duration than such periods, the remainder of the imprisonment to be with hard labour (*or as in f.*)

[*N.B.—In the foregoing the maximum of solitary confinement is given.*]

Days Impt. H. L. and S. C.

h.[1] To be imprisoned for days, of the said days to be solitary confinement, such solitary confinement not to exceed seven days in any twenty-eight days, with intervals between the periods of solitary confinement of not less duration than such periods, the remainder of the imprisonment to be with hard labour (*or as in f*).

Stoppages.

i. To be put under stoppages of pay until he shall have made good the following articles, viz.:

[or until he shall have made good the sum of *as the case may be*], *vide Articles of War*, 130, 131.

lashes.

j. To suffer a corporal punishment of lashes, and to be imprisoned, &c. &c. (*as in f. g. or h.*)

Forfeitures.

k. And in addition,—

To forfeit absolutely (*or for any period not less than* 18 *months, as the case may be*)—Good Conduct badge (or badges), and pay which he has earned by past service.

N.B.—Number of Badges to be specified.

OR,

To forfeit the annuity [gratuity, medal, or decoration, *here specify each*] which has been granted to him. (G. O. 72, 1869.)

OR,

To forfeit all or any advantage as to pension which he has earned by past service.

[1] When the imprisonment awarded exceeds 84 days.

OR,

To forfeit all right to Good Conduct pay, and to pension on discharge, whether in respect of past or future service.

N.B.—In accordance with the 117th Art. of War, an offender may be sentenced to all or any of these forfeitures.

[Instruction.—*The Medals are to be described.*]

The Court do further sentence him to be discharged with ignominy from Her Majesty's Service. Discharge with ignominy.

Signed at , this day of 18

(*Signature*) (*Signature*)

Judge Advocate. President.

[Instruction.—*Space of at least half a page is to be left for the remarks of the confirming officer.*

Confirmed,

OR,

[I confirm the finding and sentence of the Court, but [mitigate] remit]

Date. (*Signature of confirming authority.*)

I hereby approve [As Civil Governor I further approve] the sentence of the Court upon (*No. rank and name of prisoner*) on behalf of Her Majesty.

(*Date.*) (*Signature of Civil Governor.*)

N.B.—This approval on behalf of Her Majesty is equally necessary to the carrying into effect of a capital sentence in those cases where the confirming authority also administers the civil government.

REVISION.

On , the day of , at o'clock, the Court re-assemble by order of for the purpose of reconsidering their

Present the same members as before.

The letter [order *or* memorandum] containing the instructions to the Court and the reasons of the revising authority for requiring a revision of the finding (*or* sentence) is read, marked signed by the President, and attached to the proceedings.

The Court having attentively considered the observations of the revising officer and the whole of the proceedings, Revised finding.

a. do now revoke their former finding, and are of opinion, &c.,

OR,

b. do now revoke their former sentence, and now sentence the prisoner, &c. &c., Revised sentence.

OR,

Revised finding. *c.* do now revoke their former finding and sentence. The Court are now of opinion, &c., &c.,

OR,

Revised sentence. *d.* do now respectfully adhere to their former sentence [finding and sentence].

Signed at , this , day of 18 .

(Judge Advocate.) (President.)

[Instruction.—*No additional evidence for prosecution or defence can be received on the revision, and no portion of the original minutes can be altered.*]

2. *a. When Courts-martial are re-assembled for the purpose of revising their finding, and when any alteration therein is made, it is absolutely necessary that the sentence in such revised finding shall be given afresh, and it is not sufficient for the Court to state that they adhere to their former sentence in such cases.*]—(G. O. 106, 1869.)

Recommendation to mercy, &c.

[*Instruction.*—When the Court have passed judgment, and desire to recommend the prisoner to the favourable [merciful] consideration of the confirming authority; or to remark on the conduct of the parties before them; or on the manner in which a particular witness has delivered his testimony, &c., &c., they are to embody their views in a separate letter, to be signed by the President, and forwarded with the proceedings to the confirming authority, or to the Judge Advocate General, as the case may be.]

FORM OF SUMMONS TO A CIVIL WITNESS. [W. O. FORM 643.]

To

Whereas a court-martial has been ordered to assemble at on the day of 18 , for the trial of , of the regiment, I do, by virtue of the authority vested in me by the Mutiny Act, summon and require you A. B. to attend, as a witness, the sitting of the said Court at on the day of , at o'clock in the forenoon [and to bring with you the documents hereinafter mentioned, namely], and so to attend from day to day until you shall be duly discharged; whereof you shall fail at your peril.

Given under my hand at on the day of 18

(*Signature*)

Deputy Judge Advocate (*or* President).

FORM OF CERTIFICATE OF PREVIOUS CONVICTIONS.

Certified Copy of an Entry [*or* Entries] of the previous convictions by Courts-martial [*or* by Civil Court] of No. , A. B., of the , taken from the Court-martial Book [*or* Regimental, *or* Company's Defaulters' Book, *as the case may be*], of the Regiment.

Description of Court-martial by which tried.	Place and Date of Trial.	Charges upon which tried.	Finding and Sentence of the Court.	Minute of Confirmation.	Sentence whether inflicted or remitted.

Authenticated by (*here the signature of the Officer, certifying to the correctness of the extract, is to be given*).

Dated at
this day of , 18

(*To be signed by the President, and attached to the proceedings.*)

APPENDIX (No. 5) G.—CHAP. IV.

(*Referred to in par.* 732.)

FORMS OF CHARGES.

THE FOLLOWING FORMS OF CHARGES ARE TO BE USED AS OCCASION MAY REQUIRE, IN ARRAIGNING PRISONERS BEFORE A COURT-MARTIAL.

[N.B.—The references apply to the Articles of War for the year 1872.]

MUTINY.—(15th Sec. M. Act. 36th Art. of War.)

1. Having on the 18 , at , begun [excited, caused, *or* joined in, *as the case may be*] a mutiny in the regiment.

OR,

2. Having, on the 18 at when present at a mutiny taking place in the regiment, not used his utmost endeavour to suppress the said mutiny.

OR,

3. Having at come to the knowledge of a mutiny [*or* an intended mutiny, *as the case may be*] in the regiment, and not having [without delay] given information thereof to his commanding officer.

OR,

4. Having, on the , at , conspired with to mutiny.

INSUBORDINATION.—(15th Sec. M. Act. 37th Art. of War.)

5. STRIKING A SUPERIOR OFFICER.

Insubordination, accompanied with personal violence, in having, at on the struck [with his clenched fist, *or* open hand, *or* missile, *or* weapon, *as the case may be*] of the the said being his superior officer, and being in the execution of his office.

OR,

6. USING OR OFFERING VIOLENCE AGAINST A SUPERIOR OFFICER.

Insubordination, accompanied with personal violence, in having at on the offered [*or* used, *as the case may be*] violence against , by [*here state the precise nature of the violence used or offered*], the said being his superior officer, and being in the execution of his office.[1]

7. OFFERING VIOLENCE IN A MILITARY PRISON.

Insubordination, accompanied with personal violence, in having, when confined in the military prison at , on the struck [used, *or* offered[1] violence against, *as the case may be*] , of the , the said being a visitor of the said prison [*or* his superior military officer, *as the case may be*], and then and there in the execution of his office.

8. DISOBEYING THE COMMAND OF A SUPERIOR OFFICER.—(38th Art. of War.)

Insubordination, in having at on the disobeyed the lawful command of his superior officer by

[1] By the words "Offer of Violence" is implied any threatening act or gesture amounting to an attempt to use violence.

N.B.—It has been ruled that a non-commissioned officer while with his regiment or any part of it is, at all times, to be considered in the execution of his office.—(G. O. 12, 1868.)

[*here describe the precise nature of the act of disobedience imputed to the prisoner*].

9. Using Threatening Language to a Superior.—(41st Art. of War.)

N.B.—If insubordinate language accompany the act or acts of violence, it should not form the subject of a separate charge, but be stated as a circumstance in the charge alleging the violence: it is essential that the precise language used should be specified in the charge; and if accompanied by gesture the same should be accurately described.

Insubordination, in having at on the used threatening language towards his superior officer, in substance and to the effect following, that is to say, "I will take away your life."

DESERTION AND ABSENCE WITHOUT LEAVE.

10. Desertion.—(42nd Art. of War, 1st Cl.)

1st. Having deserted[1] from the regiment at on the

N.B.—If the prisoner made away with, or was otherwise deficient of any of his arms, regimental clothing, appointments, or necessaries, it should form the subject of a second charge, viz.—

2nd. Having at the time stated in the first charge made away with the following articles of his kit (102nd Art. of War), viz.:

[*Here specify the different articles deficient, and in the case of a great coat, its estimated value.*]

N.B.—If the prisoner re-enlisted into another corps and obtained bounty, a charge should be added as follows:—

3rd. Having whilst in a state of desertion from the , as stated in the first charge, enlisted into the on the , and having by such enlistment fraudulently obtained a bounty of , and also a free kit, value

11. Advising or Persuading others to Desert.—(44th Art of War.)

Having at , on the [*or* between the and], advised [*or* persuaded, *as the case may be*] private , of the regiment to desert from Her Majesty's service, by having in conversation with the said private said to him [*here state the acts done or the words used by the way of advice or persuasion*].

[1] Evidence should be given to the Court of the period of absence, of the surrender or apprehension of the prisoner, and other circumstances bearing upon the degree of his offence.

12. KNOWINGLY RECEIVING AND ENTERTAINING A DESERTER.—(44th Art. of War.)

Having at on the received and entertained of the knowing him to be a deserter, and not having immediately given notice to the proper authority, with a view to cause the said to be apprehended.

13. FRAUDULENT CONFESSION OF DESERTION BY A SOLDIER WHILE SERVING. (46th Art. of War.)

Having at on the made a false statement to his commanding officer, by fraudulently confessing himself to be a deserter from the regiment.

14. ABSENCE WITHOUT LEAVE.—(50th Art. of War.)

Having at , on the without leave from his commanding officer, absented himself from the regiment, and having remained so absent until the

OFFENCES IN THE FIELD, CAMP, GARRISON, OR QUARTERS.

15. SLEEPING ON A POST.—(57th Art. of War.)

Sleeping on his post when sentry over , at [*station*], between the hours of and o'clock, on the

(*Name of the post or guard should be stated.*)

16. LEAVING A POST BEFORE BEING RELIEVED.—(*ib.*)

Having, before being regularly relieved, left his post when sentry over (*post or guard to be here stated*), at [*station*], between the hours of and o'clock, on the

17. LEAVING A GUARD OR PIQUET.—(65th Art. of War.)

Having, on the , left his guard [*or* piquet, *or* post, *as the case may be*] at without having first obtained leave from the officer [*or* non-commissioned officer] in command of the said guard [*or* piquet, *or* post], and for not having returned until

[*N.B.—If the offender should not return to his guard or piquet before it is relieved, the latter part of the charge to be worded accordingly.*]

18. BREAKING ARREST OR ESCAPING FROM CONFINEMENT.—(69th Art. of War.)

Having at , on the , whilst under arrest [*or* a prisoner in confinement, *as the case may be*] in the [*here specify the place in which he was confined*], broken his

arrest [*or* escaped from such confinement, *as the case may be*], before he was set at liberty by proper authority.

19. Absence from Parade.—(70th Art. of War.)

Having at , on the , failed to appear at , the place of parade appointed by his commanding officer.

20. A Commander of a Guard, Piquet, or Patrol, suffering a Prisoner committed to his Charge to escape.—(73rd Art. of War.)

Having, when in command of [*here state whether a* guard, piquet, *or* patrol] at , on the , negligently [*or* wilfully, *as the case may be*] suffered , a prisoner committed to his charge, to escape (*or* released him without proper authority, *as the case may be*).

DRUNKENNESS.

21. Drunk on Duty.—(77th Art. of War.)

Having, on the been drunk when on duty, when on the guard at [*or* on piquet, *or* when employed as mounted orderly, *or* on escort duty, *as the case may be*].

N.B.—The name of the guard should always be stated; and if the prisoner was on *sentry* at the time, the particular post should be inserted in the charge.

22. Drunkenness.—(G. O. 72, 1869.)

Having, at on the , been drunk.

N.B.—In accordance with the 78th Article of War, a non-commissioned officer can be tried by a regimental or detachment court-martial for an act of drunkenness *not on duty*, but a soldier can only be brought to trial for this offence before a district or garrison court-martial.

23.—Cancelled by G. O. 72 of 1869.

DISGRACEFUL CONDUCT.—(80th Art. of War.)

24. Fraudulently Misapplying Public Money or Stores.

Disgraceful conduct in having at , on the fraudulently misapplied—

a. the sum of , being public money intrusted to him by , for the purpose of [*here state the facts fully*].

[N.B.—This is applicable to a pay-sergeant making away with money entrusted to him for the payment of his troop, battery, or company.]

b. the following property [*or* stores] belonging to Government, viz. [*here state the property and its value*].

25. Malingering and Feigning Disease.—(81st Art. of War.)

Disgraceful conduct at , on the , in malingering [*feigning, or producing disease or infirmity, or wilfully doing any act, or wilfully disobeying any orders, thereby producing or aggravating disease or infirmity, or delaying his cure, as the case may be*].

[N.B.—In each case the acts done or omitted to be done, from whence the Court are to draw the inference, that he malingered, &c., &c., should be specified.]

26. Wilfully Maiming or Mutilating.—(*ib.*)

Disgraceful conduct in having at , on the , wilfully maimed [*or* injured] himself, by discharging a loaded musket through his wrist [*or* inflicting a wound with , *as the case may be*] with intent thereby to render himself unfit for Her Majesty's service.

Or,

27. Maiming or Injuring another Soldier.

Disgraceful conduct in having at , on the , wilfully maimed [*or* injured] Private , by discharging a loaded musket through the wrist of him, the said Private [*or* inflicting a wound with , *as the case may be*] with intent thereby to render him, the said Private , unfit for Her Majesty's service.

28. Tampering with Eyes.—(*ib.*)

Disgraceful conduct in having at , on the , tampered with his eyes by [*describe the nature of the act supposed to have been done by the prisoner*], with intent thereby to render himself unfit for service.

29. Stealing or Feloniously Receiving.—(*ib.*)

a. Disgraceful conduct, in having at , on the stolen the following property, belonging to viz. [*here describe the articles and their value*].

Or,

b. Disgraceful conduct, in having at , on the , feloniously received the following articles, the property of , knowing the same to have been stolen, viz., [*here describe the articles and their value*].

[*N.B.—Both these charges are to be used in the cases where a soldier is found in possession of stolen property, and it is not certain that he committed the theft.*]

30. Offence of a Felonious or Fraudulent Nature upon a Civilian.—(81st Art. of War.)

Disgraceful conduct, in having at , on the , fraudulently obtained from a civilian, the sum of , [*or* goods, amounting to *as the case may be*], by

[Here state the precise nature of the trick or pretence by means of which the money or goods was or were obtained.]

31. Indecent Assault.—(*ib.*)

Disgraceful conduct, in having at , on the committed an indecent assault upon

32. Producing False or Fraudulent Accounts or Returns.—(88th Art. of War.)

Disgraceful conduct, in having on the at , in his capacity of Sergeant-major [quarter-master sergeant, pay sergeant, *or* pay corporal, *as the case may be*] with intent to defraud, produced to the paymaster [adjutant, *or other officer, as the case may be*] certain false certificates [*or* vouchers, *or* accounts], as follows:—

[Here specify the particular nature and description of the certificates or vouchers, or accounts produced.]

MISCELLANEOUS OFFENCES.

33. Making away with, &c., Arms, Clothing, Instruments, Equipments, Accoutrements, or Necessaries.—(G. O. 9, 1870, 102nd Art. of War.)

In cases where it is considered necessary to charge the prisoner with the above crime, care must be taken that a separate charge should contain each averment; for instance,—

1st charge.—"For having, at on the made away with the following articles of his kit," &c.

2nd charge.—"For having, at on the lost by neglect the following articles of his kit," &c.

3rd charge.—"For having, at on the sold the following articles of his kit," &c.

[Here specify the different articles in detail, and the value of each, with the exceptions provided for in the 131st Article of War. In the case of a great coat its estimated value should always be specified.]

[*N.B.—It would be competent for the court to find the prisoner "guilty" of one of the alternative charges, and to acquit him of the*

remainder; but if the several averments are embodied in one charge, the court cannot legally convict on that charge.

These instructions are applicable to all cases where an alternative charge is deemed necessary.]

34. Writing an Anonymous Letter to a Superior.—(105th Art. of War.)

Conduct to the prejudice of good order and military discipline, in having at , on the , written and sent to [A.B.], his superior officer, an anonymous letter, which letter contained the following passage [*to be set out in words; if no particular passage can be selected, the whole letter should be set out.*]

35. Obstructing and Assaulting the Police in the Execution of their Duty.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at on the assisted [soldiers *or* civilians, *as the case may be*] in obstructing and assaulting constables and in the execution of their duty.

[*N.B. The particulars in every case are to be distinctly specified. If the prisoner actually joined the party he is to be charged with the actual assault and obstruction, whether he was guilty of any violence or not.*]

36. Forcing or Striking a Sentinel.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on the , wilfully struck Private , he being at the time sentry on duty, (*or for having forced a sentry, as the case may be*).

37. A Non-Commissioned Officer Allowing a Prisoner in his Charge to get Drunk.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on the , when sergeant [*or* corporal] of the guard, wilfully [*or* through neglect] allowed Private to get drunk when a prisoner under his charge.

38. A Sentry neglecting to obey the Orders of his Post.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on the , when on sentry at No. post of guard, wilfully [*or* by neglect, *as the case may* be] allowed (*here state the particular fact*), thereby neglecting to obey the orders of his post.

39. Irregular Conduct on Guard.—(105th Art. of War.)

Conduct to the prejudice of good order and military discipline—

a. In having, at , on the , when on sentry at No. post of guard, delivered over his charge to Private , without a non-commissioned officer being present at the relief; (*or* in having, &c., &c., when on guard, relieved Private , who was on sentry at , without being regularly posted at such relief by a non-commissioned officer of the guard).

Or,

b. In having, when corporal of the guard, at , on the , wilfully permitted Private , one of the guard, to relieve Private , who was then on sentry at No. post, without him, the prisoner, being present at the relief.

40. Riotous Conduct.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having been—

a. Riotous in the streets [*or* barracks, *as the case may be*] at , on the , and for resisting and offering violence to the piquet ordered to take him into confinement.

Or (G. O. 16, 1872),

b. Riotous in the streets at , on the , and remaining absent until the .

[*N.B.—When a soldier has been drunk as well as riotous, and it is considered advisable to try him for the drunkenness, a separate charge is to be added on that account.*]

41. Breaking out of Barracks after Tattoo.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in breaking out of barracks, after tattoo, at , on the , and remaining absent until the

42. Breaking out of Barracks when confined thereto.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in breaking out of barracks when confined thereto, at on the , and remaining absent until the

43. Preferring Frivolous and Unfounded Complaints as to the Quality of Provisions or Necessaries.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on the , wilfully preferred a frivolous and unfounded complaint by saying [*the complaint to be here stated in terms.*]

44. FIRING OFF A MUSKET LOADED WITH BALL CARTRIDGE IN HIS BARRACK ROOM.—(105th Art. of War.—G. O. 16, 1872.)

Conduct to the prejudice of good order and military discipline, in having at , on the , fired off in his barrack room, a musket loaded with ball cartridge, thereby endangering the lives of other soldiers, and wantonly expending a round of the service ammunition intrusted to his charge, and further causing barrack damages to the amount of

45. MILITARY WITNESS REFUSING TO BE SWORN.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on the , when in attendance as a witness at a Court-martial, held for the trial of , unlawfully refused to be sworn, in order to give his evidence.

46. MILITARY WITNESS REFUSING TO GIVE EVIDENCE.—(*ib.*)

Conduct to the prejudice of good order and military discipline, in having at , on the after being duly sworn as a witness before a Court-martial, then sitting for the trial of , unlawfully refused to [*here state the nature of the refusal, whether to give evidence, or to answer questions, or both, as the case may be*].

47. PERJURY.—(35th Art. of War.)

Perjury in having at , on , when sworn and examined as a witness before a Court-martial then being held for the trial of , wilfully and corruptly made the following statement material to the question then at issue before the said Court [*here set out the words used*]; the said statement being false, as he, the prisoner, well knew.

APPENDIX (A. TO G.O. 56) H.—CHAP. V.

AT THE COURT AT WINDSOR,

the 22nd day of February, 1870.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS there was this day read at the Board a Memorial from the Right Honourable the Lords Commissioners of the

Admiralty, dated the 16th February, 1870, in the words following, viz.,

"Whereas it is provided by section 88 of an Act passed in the 29th year of Your Majesty's reign, entitled, 'An Act to make provision for the Discipline of the Navy,' as follows:—

"Her Majesty's Land Forces, when embarked on board any of Her Majesty's ships, shall be subject to the provisions of this Act, to such extent and under such regulations as Her Majesty, her heirs and successors, by any order or orders in council, shall at any time or times direct.

"And whereas we are of opinion that it would conduce to the better maintenance of order and discipline on board Your Majesty's ships in which Your Majesty's Land Forces may be embarked if the following regulations were established, namely:—

"1. Whenever any of Your Majesty's Land Forces, or any Royal Marines formed into a separate corps or battalion, shall be embarked as passengers in any of Your Majesty's ships, the officers and soldiers shall, from the time of embarkation, strictly observe the laws and regulations established for the government and discipline of Your Majesty's navy, and shall for these purposes be under the command of the senior officer of the ship as well as of the superior officer of the squadron, if any, to which such ship may belong.

"2. If any officer or soldier shall commit any act against the good order and discipline of the ship in which he is embarked, the commanding officer of the ship may, by his own authority and without reference to any other person, cause him to be put under arrest, or to be confined as a close prisoner, and shall thereupon, if he thinks the case requires it, transmit a report, in writing, of the charges against such officer or soldier to his superior officer, or if there be no senior officer present, to the Commander-in-Chief of Land Forces, in order that the offender may be brought before a Military Court-Martial.

"3. If any officer or soldier commits any act which, in the opinion of the commanding officer of troops, requires a trial by court-martial, such commanding officer shall cause him to be disembarked on the first opportunity, or to be removed to a transport ship, and be there proceeded against according to military law.

"No military court-martial shall be held on board any of Your Majesty's ships in commission.

"4. If any private soldier shall commit any act against the good order and discipline of the ship, the commanding officer of the ship

shall, if he thinks the case requires the summary infliction of punishment, apply for the concurrence, in writing, of the commanding officer of the troops as to the nature and amount of such punishment, if any, to be inflicted, and upon obtaining such concurrence in writing shall, by warrant under his hand, sentence the offender to suffer such punishment accordingly.

"5. The sentence shall in all respects conform to the provisions contained in the Naval Discipline Act, 1866, relating to summary punishments awarded by commanding officers.

"6. If the commanding officer of the troops shall decline to give his concurrence as aforesaid, he shall state his reasons in writing, and deliver the same to the commanding officer of the ship.

"Your Majesty's Secretary of State for War, and his Royal Highness the Field Marshal Commanding-in-Chief, have signified their concurrence in these Regulations."

Her Majesty, having taken the said Memorial into consideration was pleased, by and with the advice of Her Privy Council, to approve of what is therein proposed; and the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary directions herein accordingly.

(Signed) ARTHUR HELPS.

APPENDIX I.—CHAP. VI.

ON EVIDENCE.[1]

It is of importance in trials before Naval and Military Courts-martial to adhere to those rules of evidence which have been established in the Common Law Courts of Criminal jurisdiction,[2] and in considering this subject it will be convenient to treat first of the evidence itself, its nature and degree; secondly, of the persons, the witnesses, by whom the evidence is given; thirdly, to notice in outline some points connected with the reception and treatment of evidence, and the limits within which it should be received; and

[1] I have been favoured with this note by Mr. De Burgh, of the Inner Temple, the author of the work on 'Maritime International Law,' 1868.

[2] Op. of Att. Generals, Vol. II., p. 344; 2 Black. Rep., p. 87.

lastly, to refer to some matters which the Courts judicially notice without proof.

I. In the first place, then, as to the character of the evidence itself, a leading principle of the law of England is that which requires that the best evidence should be produced, and forbids the production of what is known as secondary or derivative evidence, until the sources of primary evidence have been exhausted.[1]

It follows as a corollary from this, that witnesses should be required to depose to facts within their own knowledge, and not those which they have heard only stated by others. Hearsay evidence is, in short, except in comparatively few cases, absolutely excluded. One chief reason amongst others of this is, the impossibility of testing the value or accuracy of such testimony by cross-examination. For every fact against a prisoner should be proved by oath, and in presence of the accused, that he may have the opportunity of cross-questioning the witness as to his means of knowledge and the truth of his statement.

Derivative, or second-hand evidence, of which it has been said that mere rumour is hearsay in its worst form,[2] cannot then, speaking generally, be received. To this rule, however, there are some exceptions, a few only of which it is material to notice here. In the first place as regards oral testimony, the evidence of a witness examined under oath on a former trial between the same parties, and since deceased, is receivable and may be proved by the testimony of a person who heard it, or by notes made at the time, provided such evidence relates to the same subject, or involves substantially the same question.[3] Secondly, declarations made by persons under the conviction of their impending death; an exception, however, which, resting as it does on a presumption arising out of the solemnity of the occasion, is not allowed weight in the case of declaration of a child of tender years; unless, indeed, he appears to have had that amount of religious knowledge which would render his evidence receivable. Where the witness is proved to be *dead*, secondary evidence of his statements on oath would of course be admissible. Other instances of the rule which rejects secondary evidence of oral testimony, so long as the witness can himself be called, are where the witness is out of the jurisdiction of the Court, where he is insane or permanently sick, and where he is kept out of the way by the contrivance of the opposite party.

As respects *written instruments*, the rule which excludes substitutionary evidence as long as the original evidence is attainable, is

[1] Smith L. Cas., Vol. ii., p. 606; Taylor on Ev., Vol. i., p. 428, ed. 1872.
[2] Best on Ev., p. 629.
[3] Taylor on Ev., Vol. i., p. 455.

enforced with especial strictness; the rule of law being that the contents of a written document which is capable of being produced must be proved by the document itself, and not by parol, or verbal, evidence. The same principle also operates to the exclusion of writings which the law considers as entitled to less weight than those which ought to be forthcoming. An original document, for instance, must, generally speaking, be produced at the trial, and a mere *copy*, however accurate, will not in the first instance be admissible. Neither can parol evidence be substituted for any instrument which the law requires to be in writing, such as a public Record; nor in place of any contract or agreement which the parties themselves have put in writing; for in such a case, as has been observed, the written agreement is of the essence of the transaction, and is its only appropriate evidence.[1] Nothing, for example, can be added to an agreement for a lease by verbal statements; the parties must stand or fall by the writing.[2] Oral testimony cannot, again, be substituted for any document the existence or the contents of which are disputed, and which is material to the issue between the parties. But where admissions, or acts equivalent to admissions, are made by one of the parties, although relating to the contents of a deed or other instrument directly in issue in the cause, such statements or acts are admissible as primary proof, without notice to produce, or accounting for the absence of, the written instrument. And generally the better opinion would seem to be that when the writing does not fall within the classes specified, no reason exists why parol evidence, even when written statements have passed between the parties, should be excluded.[3]

These are in outline some of the leading principles which are likely to arise in connection with the rule forbidding the admission of what is known as hearsay or secondary evidence, which is, in other words, any evidence of whatever kind which falls short of that degree of proof which affords the greatest certainty of the fact in dispute.

II. As respects the persons, the witnesses, by whom evidence is given, it is to be observed that the inclination of modern judges, and the tendency of recent legislation, is in favour of receiving the evidence of witnesses of all classes whatsoever, leaving its *value* to be estimated by the jury, or the Court-martial, as the case may be. Objection, in short, cannot now be sustained against the competency, but only against the credibility of a witness. Under the

[1] Per Abbott, C. J., R. *v.* Castle Morton, 3 B. and A., p. 590.
[2] Lord St. Leonard's 'Handy Book,' p. 193, ed. 1870.
[3] Taylor on Ev., Vol. i., p. 416.

law of England, however, certain grounds of incompetency still exist, and these are three in number. First, incompetency from want of reason or understanding; secondly, incompetency from want of religion; and thirdly, incompetency from interest. Of these classes of persons it may be observed that the first includes idiots from their birth; secondly, those who from sickness or other cause have lost their memory or understanding; thirdly, those who as lunatics, for example, sometimes have understanding and sometimes not; and lastly, the man who by his own act weakens, or wholly deprives himself of, his memory or understanding. These four classes of persons are incompetent witnesses, until the cause of incompetency is, if possible, removed.[1]

As to the evidence of children, immaturity of intellect is as much a ground of incompetency as where the understanding has failed from disease; but it may be shortly stated that where a material witness is of tender years, the Judge or Court usually examines him with a view of ascertaining whether he is aware of the nature and obligation of an oath, and the consequences of perjury. The requisite degree of knowledge on these points is presumed in law to arise at the age of fourteen; but the presence of sufficient intelligence and education in persons of far earlier age will operate to set this presumption aside, so as to admit of receiving their testimony.

With regard to incompetency from want of religious knowledge the same principles apply to an adult deficient in the necessary amount of religious instruction, as in the case of a child. As to incompetency for want of religious *belief*, it may be sufficient here to state as the result of the authorities, that every person is admissible to give evidence who believes in a Divine Being, the avenger of falsehood and perjury in man, and who consents to invoke by some binding ceremony the attestation of that Power to the truth of his deposition.[2] The witness is to be sworn in that form which he considers most binding on his conscience, and if he allows himself to be sworn in such form without objecting he is liable to be indicted for perjury if his testimony be false.[3]

A third species of incompetency is that arising from *interest* in the matter in question. This kind of incapacity has however been so far modified by recent legislation[4] as that it may now be laid down that competency is the rule, and incompetency the exception. It is upon this principle that the evidence of an accomplice is

[1] Phillips and Arnold on Ev., p. 4; Best on Ev., p. 298.
[2] Best on Ev., p. 227; Omichund *v.* Barker; 1 Smith L. Cas., p. 340.
[3] Best, p. 230. [4] 6 & 7 Vic., c. 85.

received; the only ground on which the testimony of such a person could be objected to being the obvious interest he would have in saving himself from punishment by securing the conviction of the accused. A confession therefore by a witness of any conduct, however infamous, goes only to his credit, not to his competency.

As to husband and wife, the old rule was that the husband could not be a witness for or against his wife, nor the wife for or against the husband.[1] Now, however, by a recent statute (16 & 17 Vict., c. 83, s. 4) it is provided that the husbands and wives of parties are admissible as witnesses, except in any criminal proceedings, or in proceedings instituted in consequence of adultery. Husband and wife cannot therefore testify in a criminal case either for or against each other, except on a trial for treason, or where the very nature of the offence charged, *e. g.*, a personal wrong done to the wife, necessitates a qualification of the rule. And it has recently been decided by the Court for the consideration of Crown cases reserved, that a wife's evidence in favour of prisoners who were charged with an offence (theft), and her husband in the same indictment for receiving the goods with guilty knowledge, is not admissible.[2]

The law of England admits as sufficient the testimony of one *credible* witness, except in trials for perjury—for there is, in that case, only one oath against another—[3] in cases of felonious, advised, and open speaking against the Queen, and in certain cases of high treason and misprision of treason.[4] The oaths of two credible witnesses are also required to sustain a conviction under the 87th clause of the Mutiny Act relating to quartering of soldiers. But with these exceptions it has been ruled that an accomplice alone is a competent witness (although it is prudent that his testimony should be corroborated in some material fact) and a conviction sustained by such testimony alone would be strictly *legal*. It is true that the evidence of an accomplice comes "sullied with contamination;" but this testimony may be confirmed by the clearness and consistency of his narrative.[5] The evidence of an informer, whatever may be its merits or demerits, is not that of an accomplice.[6]

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[1] Broome and Halley, Com., Vol. iv., p. 448.

[2] "Regina *v.* Thompson," affirming "Regina *v.* Thompson," L. R., 1 C. C. R., p. 349.

[3] R. *v.* Muscot, 10 Mod., p. 193; and see per Erle, C.J. in Reg. *v.* Shaw, L. and C., p. 579.

[4] 1 Ed. VI., c. 12; 5 & 6 Ed. VI., c. 11; 7 Wm. III., c. 3; Broome Com., Vol. iv., p. 450.

[5] Broome Com., Vol. iv., p. 459; Phillips and Arnold on Ev., Vol. i., p. 89, 10th ed.

[6] Phillips and Arnold, Vol. i., p. 102.

III. As respects the reception and treatment of evidence, there are some general principles which it is important to bear in mind. (*a.*) In the first place, the testimony should be relevant, that is to say, confined strictly to the point at issue. A collateral inquiry into other facts and circumstances should only be received when they bear upon the charge and constitute presumptive proofs. This rule is founded, as observed by a learned person, on common justice, "for no person," says an old writer, "can be expected to answer, unprepared and at once, for every action of his life; few even of the best men would choose to be put to it."[1] It is on this principle that, on consideration of a charge of mutiny, or exciting to mutiny, the acts or declarations of co-mutineers or letters written by them, may, as in the analogous case of trials for conspiracy before courts of civil judicature, be received in evidence against a particular individual, testimony having been previously offered of the existence of the conspiracy and of the connection of the accused therewith. For it is an established rule that when several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law the act of the whole party, and, therefore, the proof of such act will be evidence against any of the others who were engaged in the same general conspiracy, without regard to the question whether the prisoner is proved to have been concerned in that particular transaction.[2] (*b*) Secondly, it is sufficient if the substance or the material part of the charge be proved, the law no longer requiring that every circumstance, however minute, should be established precisely as laid in the indictment. This is the principle which lies at the root of the Criminal Justice Improvement Act,[3] under which in indictments for murder, for example, or manslaughter, it is no longer necessary to specify with technical exactness *the means* by which the injury was inflicted, but the prisoner may be convicted if it be proved, to use the language of the statute, that "the defendant did feloniously, wilfully, and of malice aforethought kill and murder" the deceased.[4] Similarly, an offender indicted for felony may be found guilty, if it appears that he did not complete the offence charged, of an attempt to commit the same, and shall be liable to the same consequences as if charged with and convicted of the attempt only. So—to select

[1] Foster, Discourse of High Treason, Broome Com., Vol. iv., p. 449.
[2] Phillips and Arnold on Ev.
[3] 14 & 15 Vic., c. 100, better known perhaps as Lord Campbell's Act.
[4] Sec. 4.

examples connected with military offences—on a charge of desertion, absence without leave may be found, or if the charge is one of offering violence to a superior officer in the discharge of his duty, the prisoner may be convicted of offering violence only, and a punishment proportionate to the latter offence may be awarded. And, finally, on the same principle that it is sufficient to prove the substance of the issue, it has been held that it is not necessary to prove *the time* at which the offence was committed precisely as laid, unless in cases where time is of the essence of the offence: nor will any judgment, indictment, or information for any felony or misdemeanour be stayed or reversed for stating the time at which the offence was committed *imperfectly*, nor for stating the offence to have been committed on a day *subsequent to* the finding of the indictment or exhibiting the information; or on an impossible day; or on a day that never happened.[1] And a similar rule obtains in cases of indictment for high treason.[2]

IV. It remains in concluding this note to make brief reference to some general matters which are judicially noticed without further proof.

1. Every sovereign recognises, and all public tribunals notice the corporate existence and external relations of other sovereign States in the civilized world; for in the community of societies States are to each other as individuals.[3]

2. The judges recognise without proof the Common and Statute Law, the Law of Nations, the Customs of Parliament, the Prerogatives of the Crown and Royal Proclamations; but they will not take cognizance of the internal laws, usages, and customs of foreign States, or even of the Colonies, which must be given in evidence and proved as facts, under 28 & 29 Vict., c. 63. A Military Court would, on the other hand, recognise the laws and customs of the Army, the Regulations and Warrants made by the Sovereign for the government of the Army, and the general or garrison orders of the General Officer in command.

3. The judges also notice judicially the London, Edinburgh, and Dublin Gazettes, on their mere production. They take cognizance also of various official seals, as those of the great Officers of State, of Courts of Justice, of Public Departments, and of the Corporation of the City of London. The seal of a notary public would also perhaps be judicially noticed, as being that of an officer recognised by the civilized world.[4] The Statute known as the Documentary

[1] See 7 Geo. IV., c. 64, s. 20. [2] Phillips and Arnold on Ev., Vol. i.
[3] Taylor on Ev., Ch. 2, Vol. ii., p. 3; Phillimore, Inter. Law, Vol. i., p. 3.
[4] See Earle's Trusts, 4 K. and J. Rep., p. 300.

Evidence Act, 1845, admits in evidence without formal proof a numerous class of official documents.[1]

4. It is unnecessary to prove facts which may certainly be known from the invariable order of nature; nor is it necessary to prove the course of time, nor of the heavenly bodies, nor the legal weights and measures, nor the value of the coin of the realm, nor generally any matter of public history affecting the whole people.

5. Courts also notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, the local divisions and districts of the country, the political constitution of their own government, and the persons who share in its regular administration. They will recognise also the accession and demise of the Sovereign, the heads of departments, and the principal officers of State. In like manner a Court-martial would notice without proof the military districts and organization of the Army, and the officers in authority therein.

6. And lastly, all tribunals are bound to notice judicially their own rules and canon of proceeding; also the customs and practice of the Courts of Common Law at Westminster, and the limits of their jurisdiction.[2]

APPENDIX J.—CHAP. IX.

REGIMENTAL DEBTS ACT,[3] 1863, AND REGULATIONS THEREUNDER.

[*Extracts.*]

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REGULATIONS BY ROYAL WARRANT OF 30TH SEPTEMBER, 1864. [Pars. 2 to 4.]

8. If preferential charges not paid, power to committee to sell and con-

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[1] 8 & 9 Vic., c. 113; and see 14 & 15 Vic., c. 99.

[2] See Taylor on Ev., Vol. i., c. 2, pp. 3-31.

[3] The Act (26 & 27 Vic., c. 57) is referred by Sec., and the Regulations by Par. The extracts relate only to the duties of a Committee of Adjustment at the Regiment or Station.

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vert effects, and to get in credits, and, after payment of expenses, to secure surplus 329
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PART I.—*Collection and Disposal of Effects.*

SEC. VII. Immediately on the death of an officer or soldier on service, such committee of officers as may be prescribed by royal warrant, according to the circumstances of different cases, hereinafter called the committee of adjustment, shall secure all such of his effects as—

Where the death occurs in the United Kingdom, are in camp or quarters; and

Where the death occurs out of the United Kingdom, are within the station, colony, or command.

Regulations by Royal Warrant of 30th Sept., 1864.

Par. 2. Where the deceased was an officer employed on the staff, the committee of adjustment is to consist of two officers to be

appointed by the officer commanding on the station, one of whom is to be, if practicable, a field officer.

Par. 3. Where the deceased was an officer not employed on the staff, the committee of adjustment is to consist of the major of the regiment or the officer doing the major's duty in his absence, and two other officers of the regiment not under the rank of captain (unless officers of that rank or of the regiment cannot conveniently be had), to be appointed by the commanding officer of the regiment or by the officer commanding on the station.

Par. 4. Where the deceased was a soldier, the committee of adjustment is to consist of the officer commanding the troop or company to which the deceased belonged, and two other officers of the regiment to be appointed by the commanding officer.

SEC. VIII. Provided, that if the representative of the deceased, or his widow (if any), or any of his next of kin, pays in full the preferential charges,[1] the committee of adjustment shall not further interfere in relation to the property.

If such payment is not made, then, within one month after the death, the committee of adjustment may and shall, without any representation taken out, and as if they were the representatives of the deceased, and to the exclusion of all other authorities and persons whomsoever, sell or convert into money such parts of the effects of the deceased as do not consist of money,—and also where the death occurs out of the United Kingdom get in and give receipts (which shall be effectual discharges) for all or any of the credits forming part of the estate of the deceased, and being payable or recoverable in India or in the colony or possession in which the

[1] These are payable in the following order:—

(1.) Expenses of last illness and funeral:

(2.) Military debts, namely, sums due in respect of—

(*a*) Quarters; (*b*) Mess, band, and other regimental accounts; (*c*) Military clothing, appointments and equipments, not exceeding a sum equal to six months' pay of the deceased, and having become due within eighteen months before his death; including sums due to any agent or to any paymaster, quartermaster, or other officer, on any such account, or on account of any advance made for any such purpose; to which shall be added, where the death occurs out of the United Kingdom,—

(3.) Servants' wages, not exceeding two months' wages to each servant:

(4.) Household expenses incurred within a month before the death, or after the last issue of pay to the deceased, whichever is the shorter period.

Any doubts arising under this Sect. (3) are to be referred to the decision of the Secretary of State under Sect. 6 of the Act.

deceased was quartered (as the case may be), and, if they think fit, sue for and recover any of such credits, and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the preferential charges, and secure the surplus of the effects, or effects and credits, as the case may be, remaining over after all such payments.

Par. 5. The committee of adjustment are in all cases, as soon as practicable after the death, to make an inventory of the property, and an account of the debts and credits, of the deceased.

Par. 6. The inventory and account are to be made in duplicate, on the forms supplied, and each of the duplicates is to be certified by the committee of adjustment.

One of the duplicates is to be dealt with as hereafter in these regulations directed.

Where the death occurs in India, the second of the duplicates is to be sent to the military secretary to the government of the presidency in which the deceased was quartered, and is to be delivered by him to the administrator general for the presidency, in cases where § (3) of section 12 of the Act applies, and is to accompany the remittance of the surplus in cases where § (5) of the same section applies.

Where the death occurs elsewhere than in India, the second of the duplicates is to be kept with the regimental or other proper records.

Par. 7. The effects secured are to be kept in a place of security until duly sold or otherwise disposed of.

Par. 8. The effects secured are to be disposed of at fair and open auction at the most favourable opportunity, in the case of an officer in the presence of a member of the committee of adjustment, and in the case of a soldier, in the presence of the officer commanding the troop or company.

Par. 9. The practice of employing a non-commissioned officer in selling by auction such of the effects of a deceased officer or soldier as are not otherwise disposed of is to be adhered to only in cases in which it appears to be most advantageous for the estate of the deceased.

When much trouble and responsibility are thrown upon the man by his being so employed, a commission, payable out of the effects, at a rate varying from two to five per cent. on the amount of the produce of the sale, according to the greater or less degree of trouble and responsibility thereby caused,

may be paid to him, and charged in the statement of the accounts of the deceased, the man's receipt for the amount being annexed thereto, together with the certificate of the commanding officer that his employment as auctioneer was most advantageous for the estate, and that the duties performed by him justify the remuneration charged.

Par. 10. Where the committee of adjustment withdraw from interference in relation to the property of the deceased in consequence of the representative of the deceased, or his widow, or some of his next of kin, paying in full the preferential charges, the committee are forthwith to forward, together with the inventory and account, a report of the facts and circumstances as follows:

Where the death occurs elsewhere than in India, or the death occurs in India, the deceased being (in the latter case) a soldier of Her Majesty's army,—to the Secretary of State for War:

Where the death occurs in India, the deceased not being a soldier of Her Majesty's army,—to the military secretary to the government of the presidency in which the deceased was quartered.

SEC. IX. Where the death occurs in India, the committee of adjustment may, in such cases, under such circumstances, and at such time or times, as may be prescribed by royal warrant, according to the circumstances of different cases, deliver over the effects secured by them to the administrator general for the presidency in which the deceased was quartered.

Par. 11. The committee of adjustment (in India) are to deliver over the effects secured by them to the administrator general only in case they apprehend that considerable difficulty or delay may arise in or about the collection or realization of the effects and credits of the deceased, in consequence of the character of any investment, or in consequence of it being requisite to institute some action or suit in relation to the property of the deceased, or in case there is some other peculiar circumstance connected with the property making it in the judgment of the committee, expedient to take that course.

Par. 12. Where the Committee of adjustment deliver over effects to an administrator general, they are to do so as soon as practicable after they have determined to take that course.

Par. 13. Where the committee of adjustment deliver over effects

to an administrator general, they are forthwith to forward, together with the inventory and account, a report of the facts and circumstances, as follows :—

Where the deceased was a soldier of Her Majesty's army,—to the Secretary of State for War:

In other cases,—to the military secretary to the government of the presidency in which the deceased was quartered.

Disposal of Surplus.

SEC. X. The committee of adjustment shall, according to the circumstances of the case, remit or lodge the surplus aforesaid to or in the hands of such paymaster or other officer or person, at such time or times, in such manner, and together with such accounts, vouchers, reports, and information, as may be prescribed by royal warrant.

Par. 14. Where the deceased was an officer employed on the staff, and the death occurs elsewhere than in India, the committee of adjustment are to remit or lodge the surplus, as follows :—

Where the death occurs in the United Kingdom, they are to remit the surplus to the general agent for the recruiting service in London:

Where the death occurs at any station abroad (except in India), they are to lodge the surplus in the commissariat chest, taking a receipt for the amount from the officer in charge of the commissariat chest, which receipt, together with the inventory and the account of debts and credits, they are to transmit to the Secretary of State for War, making at the same time a full report of their proceedings to the officer commanding on the station.

Par. 15. Where the deceased was an officer not employed on the staff, and the death occurs elsewhere than in India, the committee of adjustment are to lodge the surplus in the hands of the regimental paymaster, who is to credit the amount in the next regimental pay list.

Par. 16. Where the deceased was a soldier of Her Majesty's army, then, whether the death occurs in India or elsewhere, the committee of adjustment are to lodge the surplus in the hands of the regimental paymaster, who is to credit the amount in the next regimental pay list or casualty return.

Par. 17. Where the death occurs in India, the deceased not being a soldier of Her Majesty's army, the committee of ad-

justment are to remit the surplus to the military secretary to the government of the presidency in which the deceased was quartered.

Par. 18. Whenever a committee of adjustment remit or lodge a surplus they are to send or lodge therewith one of the duplicates of the inventory and of the account.

Par. 19. In the case of a soldier of Her Majesty's army, the officer present at the sale is to furnish the paymaster with a certified statement of the particulars thereof, on the printed forms supplied, and is to cause the amount of the produce to be carried to the credit of the man's account in the ledger.

In other cases, where the death occurs in India, the officer present at the sale is to furnish the military secretary to the government of the presidency in which the deceased was quartered with a certified statement of the particulars of the sale.

Par. 24. Where a deceased officer or soldier leaves a will, then, if representation is not taken out, the original will, and, if representation is taken out, a complete and authenticated copy of the will, is to be sent along with the inventory account and other papers by the committee of adjustment, and is to be transmitted to the Secretary of State for War or the Secretary of State for India in Council, as the case may require.

Where the original will is sent, a complete and authenticated copy of it is to be first made under the direction of the committee of adjustment, and is to be kept with the regimental or other proper records.

Medals and Decorations.[1]

SEC. XIX. Medals and decorations belonging to an officer or soldier dying on service shall not be considered to be comprised in the personal estate of the deceased with reference to the claims of creditors or for any of the purposes of administration under this Act or otherwise; and, notwithstanding anything in this or any other Act contained, the same, when secured by the committee of adjustment, shall be held and disposed of according to regulations laid down by royal warrant.[2]

[1] As to medals, &c., see Vol. II. p. 326.

[2] No regulations have been issued, but the Royal Warrant of September, 1864, orders their disposal by the Secretary of State, as, according to different circumstances, he shall see fit.

Exception as to Regimental Paymasters.

SEC. XX. The case of a regimental paymaster dying on service shall, notwithstanding anything hereinbefore contained, be provided for as follows:—

(1) That case shall be deemed wholly excepted out of the foregoing provisions of this Act, save so far as they define and give preference to and regulate the payment of and provide for decisions respecting preferential charges, and as they relate to the duties and powers of the committee of adjustment, and to medals and decorations:

(2) The duties and powers of the committee of adjustment in relation to the property shall nevertheless, in the case of a regimental paymaster, be deemed to arise in full, immediately and unconditionally, on the death, and to continue notwithstanding the payment of the preferential charges by any person:

(3) Money in the possession or under the control of a regimental paymaster at his death shall not be considered to be comprised in his effects for the purposes of this Act:

(4) The surplus in the hands of the committee of adjustment shall, in the case of a regimental paymaster, be dealt with by them as may be prescribed by royal warrant, and not according to the foregoing provisions of this Act.

Par. 30. In the case of a regimental paymaster, the committee of adjustment is to consist of the commanding officer, the quartermaster, and the senior captain (present at head quarters) of the regiment.

The committee of adjustment are to forthwith remit the surplus to the Secretary of State for War.

PART II.—*Desertion and other Cases.*

SEC. XXVII. In every case of desertion, such committee of officers as may be prescribed by royal warrant, according to the circumstances of different cases, herein-after called the committee of adjustment, shall immediately secure all such of the deserter's effects as—

Where the desertion occurs in the United Kingdom, are in camp or quarters; and

Where the desertion occurs out of the United Kingdom, are within the station, colony, or command;

and shall forthwith make an inventory thereof, and shall, within

three months after the desertion, sell or convert into money such parts of the deserter's effects as do not consist of money, and thereout pay the expenses attending the execution of the provisions of the present section.

SEC. XXVIII. The surplus remaining after such payment shall be liable to be applied in or towards payment of any such expenses and debts incurred and owing by the deserter as would, under Part I. of this Act, be preferential charges on his personal property in case he had died on service, with the like preference, in the like order, and subject to the like provision for decision of doubt or difference, as would in that case apply, as nearly as may be, mutatis mutandis.

The committee of adjustment shall apply the same accordingly, and then shall dispose of any property remaining in their hands according to regulations laid down by royal warrant.

SEC. XXIX. For the purposes of this part of this Act, absence without leave for twenty-one days shall be deemed included in the term, desertion.

SEC. XXX. The provisions of this part of this Act shall apply, as nearly as may be, mutatis mutandis, in the case of a soldier delivered up as an apprentice, or convicted of felony.

Par. 31. In all cases of desertion, and of a soldier being delivered up as an apprentice, or convicted of felony, by the civil power, the committee of adjustment is to be composed in like manner as in the respective cases of death.

Par. 32. The foregoing regulations relative to the respective cases of death are to be applied in cases of desertion, apprenticeship, and felony, as far as the difference of the circumstances will admit; but the committee of adjustment are forthwith to remit or lodge the money remaining in their hands to or in the hands of the regimental paymaster, military secretary, or other officer or person to whom or in whose hands they are to remit or lodge the surplus in the respective cases of death; and he is forthwith to transmit the same to the Secretary of State for War or the Secretary of State for India in Council, as the case may require.

The same is to be then with all convenient speed applied as follows:—

In case of desertion, in the manner in which, if the same were an undisposed-of residue, it would for the time being be applicable under section 18 of the Act at the expiration of such period of six months as in that section mentioned:

In other cases, in such manner as the Secretary of State for War or Secretary of State for India in Council (as the case may be) in his discretion thinks fit.

PART III.—*Insanity.*

SEC. XXXI. Where an officer or soldier is removed, put on half pay, or discharged, on the ground of insanity, such committee of officers as may be prescribed by royal warrant, according to the circumstances of different cases, hereinafter called the committee of adjustment, shall immediately secure all such of his effects as—

Where the insanity occurs during service in the United Kingdom, are in camp or quarters; and

Where the insanity occurs during service out of the United Kingdom, are within the station, colony, or command.

SEC. XXXII. The effects of such an officer or soldier shall be liable to be applied in or towards payment of any such expenses and debts incurred and owing by him as would, under Part I. of this Act, be preferential charges on his personal property in case he had died on service, with the like preference, in the like order, and subject to the like provision for decision of doubt or difference, as would in that case apply, as nearly as may be, *mutatis mutandis*.

SEC. XXXIII. If any person who would, if such officer or soldier were dead, be entitled to take out representation to him (otherwise than as a creditor), or his wife (if any), or any near relative, pays in full the expenses and debts aforesaid, the committee of adjustment shall not further interfere in relation to the property.

If such payment is not made, then, within one month after the removal, putting on half pay, or discharge, is known at the quarters where the effects are, the committee of adjustment may and shall sell or convert into money such parts of the effects as do not consist of money, and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the expenses and debts aforesaid, and shall dispose of any property then remaining in their hands as may be prescribed by royal warrant, to the end that the same may be applied for the benefit of the officer or soldier to whom it belongs.

Par. 33. In cases of insanity, the committee of adjustment is to be composed in like manner as in the respective cases of death.

Par. 34. The foregoing regulations relative to the respective cases of death are to be applied in a case of insanity, as far

as the difference of the circumstances will admit; but the committee of adjustment are forthwith to remit or lodge the money remaining in their hands to or in the hands of the regimental paymaster, military secretary, or other officer or person to whom or in whose hands they are to remit or lodge the surplus in the respective cases of death; and he is forthwith to transmit the same to the Secretary of State for War or the Secretary of State for India in Council, as the case may require.

The same is to be then, with all convenient speed, applied for the benefit of the officer or soldier to whom it belongs, in such manner as the Secretary of State for War or the Secretary of State for India in Council (as the case may be) in his discretion thinks fit.

APPENDIX K.—Chap. IX.

COURTS OF INQUIRY IN THE VOLUNTEER FORCE.

Extracts from "The Volunteer Act, 1863," *and from the Regulations.*

26 & 27th Vic., c. 55.

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Sec. 15. The Lieutenant of the County to which a Volunteeer Corps belongs, or within whose Jurisdiction the Head Quarters of an Administrative Regiment are situate, may at any Time assemble a Court of Inquiry to inquire into any Matter relative to the Corps or Regiment, or to any Officer or Volunteer or Non-commissioned

Officer of the Permanent Staff belonging thereto, and to record the Facts and Circumstances ascertained on such Inquiry, and if required, to report on the same, for the Information and Assistance of such Lieutenant; such Court, where the Inquiry is with reference to an Officer, to be composed of Officers of the Volunteer Force belonging to the County, and in other Cases to be composed either of Officers and Volunteers belonging to the Corps or Regiment, or of such Officers, or of such Volunteers.

The Commanding Officer of a Volunteer Corps or Administrative Regiment may at any time assemble a Court of Inquiry, composed either of Officers and Volunteers belonging to the Corps or Regiment, or of such Officers or of such Volunteers, to inquire into any Matter relative to the Corps or Regiment or to any Volunteer or Non-commissioned Officer of the Permanent Staff belonging thereto, and to record the Facts and Circumstances ascertained on such Inquiry, and, if required, to report on the same, for the Information and Assistance of the Commanding Officer; but nothing herein shall authorize any Inquiry with reference to an Officer otherwise than by a Court assembled by Direction of such Lieutenant of the County as aforesaid, and composed exclusively of Officers of the Volunteer Force belonging to such County.

Extract from Regulations dated 18th Sept., 1863.

Par. 74. A Court of Inquiry is not a judicial body; it has no power to administer an oath.

It is to be considered as a Board of which a Lord-Lieutenant or an Officer in Command of a Corps may make use, to assist him in arriving at a correct conclusion on any subject upon which it may be expedient for him to institute an inquiry.

If it is found necessary to cause the conduct of an Officer to be investigated by a Court of Inquiry, the Lord-Lieutenant can alone convene the Court, which in such a case, must be composed of Officers of the Volunteer Establishment within the county over which the Lord-Lieutenant has jurisdiction.

Par. 75. The duties of a Court of Inquiry depend on the instructions which the convening authority may think proper to give.

It may either be employed merely in collecting and arranging evidence, or it may, in addition, be directed to give an opinion as to the facts established by that evidence, but it has no power to pronounce any judgment as to the course to be taken by the convening authority in dealing with those facts.

When facts connected with the conduct of an individual are submitted to the investigation of a Court of Inquiry, it is necessary that the instructions for the guidance of the Court should be

sufficiently specific, as regards matter, names, dates, and places, to convey clearly to the Court the nature of the subject into which it is appointed to inquire, and also to enable the person whose conduct is called in question, to know what he has to answer.

It rests with the authority who orders the assembly of a Court of Inquiry to decide whether it shall be open or close.

All evidence taken by a Court of Inquiry is to be recorded as nearly as possible in the words of the witness, and in the order in which it is received.

The proceedings, when closed, are to be signed by the President and Members, after which they are to be forwarded by the President to the convening authority.

Par. 76. A Court of Inquiry may be re-assembled as often as the superior authority may deem necessary, and on every occasion of its meeting it is competent to receive and record new evidence.

Par. 77. The Commanding Officer of an Administrative Regiment is authorised to assemble a Court of Inquiry, to investigate any matter with which he has himself the power of dealing.

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